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Supreme Court of the United States

October Term, 1997

CASSAN ENTERPRISES, INC., CMC INVESTMENTS, INC., AND TODD INVESTMENT COMPANY,

Petitioners,

vs.

CHRYSLER CORPORATION, DOLLAR SYSTEMS, INC., DOLLAR RENT-A-CAR SYSTEMS, INC., AND PENTASTAR TRANSPORTATION GROUP, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether plaintiffs' allegations that they are competitively disadvantaged and injured by defendants' unreasonably restrictive policies and agreements, the full consummation of which would constitute an unlawful tying arrangement, state a claim for relief under Section 1 of the Sherman Act (15 U.S.C. § 1) even if plaintiffs were not actually forced to purchase the tied product?

2. Whether in a Sherman Act antitrust case the antitrust injury requirement must be pled in a complaint with heightened specificity to overcome a Fed. R. Civ. P. 12(b)(6) motion to dismiss, or are allegations (which must be accepted as true and all inferences drawn in the non-moving party's favor) which put the moving party on notice of the claim sufficient?

LIST OF PARTIES

The names of all parties to the proceeding below appear in the caption of the case on the cover page.

Pursuant to Supreme Court Rule 29(6), the petitioners state that petitioner Cassan Enterprises, Inc. has no parent companies and wholly owns petitioner CMC Investments, Inc. Neither Cassan Enterprises, Inc. nor CMC Investments, Inc. have any non-wholly owned subsidiaries. Petitioner Todd Investment Company has no non-wholly owned subsidiaries or any parent companies.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Cassan Enterprises, Inc., CMC Investments, Inc., and Todd Investment Company respectfully petition that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in favor of respondents in this action.

OPINIONS BELOW

The Order of the district court filed on February 21, 1995, dismissing petitioners' initial Complaint is not reported and is reprinted at Appendix ("App.") C to the petition, at pages App. 42-App. 45. The Order of the district court filed on September 29, 1995, dismissing the First Amended Complaint is not reported and is reprinted at App. D, at pages App. 46-App. 52. The Order of the district court filed on May 28, 1996, dismissing the Second Amended Complaint without leave to amend and with prejudice is not reported and is reprinted at App. E, at pages App. 53-App. 55.

The unpublished opinion of the Court of Appeals for the Ninth Circuit filed on October 30, 1997, affirming the district court's judgment, is reprinted at App. A to the petition, at pages App. 1-App. 4.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its opinion on October 30, 1997. No petition

for rehearing was filed. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several States . . . is declared to be illegal. . . .

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in pertinent part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . , and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Federal Rule of Civil Procedure 8(a)(2) provides in pertinent part: "A pleading which sets forth a claim for relief . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . . "

Federal Rule of Civil Procedure 12(b)(6) provides in pertinent part: "[T]he following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted. . . . "

STATEMENT OF THE CASE

This is a civil antitrust proceeding brought by petitioners Cassan Enterprises, Inc. ("Cassan"), CMC Investments, Inc. ("CMC") and Todd Investment Company ("Todd"), plaintiffs below, seeking damages and injunctive relief under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26, respectively) for alleged violations of Section 1 of the Sherman Act (15 U.S.C. § 1). In dismissing with prejudice petitioners' Second Amended Complaint,[1] both the district court and the Court of Appeals for the Ninth Circuit erred by ignoring the notice pleading requirements of Fed. R. Civ. P. 8(a)(2) and distorting long-established substantive antitrust law as developed by this Court.

Defendants Dollar Systems, Inc. and Dollar Rent-A-Car Systems, Inc. (now merged, collectively "Dollar") are car rental companies which franchise Dollar car rental franchises. App. B at App. 7 (¶¶ 5-6). In or about 1990, Dollar became a wholly owned subsidiary of defendant Pentastar Transportation Group, Inc. ("Pentastar"), which itself is a wholly owned subsidiary of defendant Chrysler Corporation ("Chrysler"), one of the three major automobile manufacturers in the United States. *Id.* at App. 7-App. 8 (¶¶ 7-9).

In 1967, petitioner Cassan entered into an exclusive franchise agreement with Dollar which permitted Cassan to operate a Dollar car rental franchise in the Seattle,

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[1] The Second Amended Complaint for Violation of Section 1 of the Sherman Act is reprinted at App. B, at pages App. 5-App. 41.

Washington are a ("Seattle Franchise"). *Id.* at App. 6 (¶ 1). In 1988, petitioner CMC (which is wholly owned by Cassan) began operating as a sub-franchisee of Cassan in the area covered by the Seattle Franchise. *Id.* at App. 6 (¶ 2). In 1973, petitioner Todd entered into an exclusive franchise agreement to operate in the Portland, Oregon area ("Portland Franchise"). *Id.* at App. 6-App. 7 (¶ 3).

Defendants Chrysler and Pentastar, through Dollar, own and control various derivatives of the Dollar trade name, related service marks, logos and designs. *Id.* at App. 9 (¶ 14). In their exclusive franchise agreements with Dollar, petitioners had been granted the right to use this intellectual property in the operation of their respective businesses, including advertising. *Id.* at App. 9 (¶ 15), App. 11 (¶ 25).

Consequently, from the inception of their franchises, petitioners extensively utilized the Dollar trade name, service marks, logos and designs in their advertisements that featured automobiles they had purchased or leased which were manufactured by General Motors ("GM"), Chrysler, Ford, and others. *Id.* at App. 12 (¶ 26), App. 13-App. 14 (¶ 33). The Dollar name and related intellectual property rights granted to petitioners were valuable assets and allowed them, among other things, to receive substantial monetary advertising reimbursement/allowances or other subsidies from automobile manufacturers such as GM, if petitioners used that particular manufacturer's name or automobiles in their Dollar advertisements or promoted them as featured cars. *Id.* at App. 12 (¶ 26), App. 15 (¶ 39). This practice took place over an approximately 25-year period with the full knowledge, consent and acquiescence of Dollar. *Id.* at

App. 9-App. 10 (¶ 17), App. 12 (¶ 26), App. 13-App. 14 (¶ 33), App. 14 (¶ 35).

In 1990, almost immediately after Chrysler/Pentastar acquired and took control of the Dollar franchise system, Pentastar/Dollar significantly and abruptly changed its long-standing policy and imposed an anticompetitive "tie-out" restriction on petitioners, which prohibited the use by petitioners and other Dollar franchisees of Dollar's name, service marks and logos in advertisements in connection with any automobile manufactured by any of Chrysler's competitors. *Id.* at App. 8-App. 9 (¶ 13), App. 9 (¶ 16), App. 11 (¶ 25), App. 12 (¶¶ 27-28), App. 29 (¶ 83(g)), App. 29 (¶ 85), App. 30 (¶ 90). Stated differently, as a "tie-in" petitioners and other Dollar franchisees could only utilize Dollar's service marks and logos in their advertisements on the condition they leased, purchased and/or featured defendant Chrysler's automobiles in such advertisements. For antitrust purposes, the "tied product" in defendants' unreasonably restrictive tying arrangement is Chrysler automobiles (unwanted or inferior product) and the "tying product" is the unfettered use of the Dollar name, service marks, logos, etc. (wanted product) in advertisements. *Id.* at App. 9 (¶ 16), App. 10 (¶¶ 18-19), App. 29-App. 30 (¶¶ 85-87), App. 30-App. 31 (¶¶ 90-92).

The intended anticompetitive effect of this policy was to: 1) force Dollar franchisees to lease less desirable Chrysler products from Chrysler at a higher cost and on less favorable terms (*id.* at App. 10 (¶ 19), App. 30 (¶ 91)); 2) eliminate freedom of choice by effectively preventing Dollar franchisees from leasing or purchasing automobiles from Chrysler's competitors (*id.* at App. 12

(¶ 27), App. 30 (¶¶ 88, 91), App. 32 (¶ 94)); 3) eliminate and distort price and quality competition for automobiles (*id.* at App. 8-App. 9 (¶ 13), App. 15 (¶ 37), App. 30 (¶ 90)); 4) artificially maintain or increase the prices paid by consumers and provide diminished services in the relevant markets for rental cars (*id.* at App. 31 (¶ 93), App. 32 (¶¶ 94, 97)); and 5) reduce interbrand competition by suppressing petitioners' as well as other Dollar franchisees' ability to efficiently and openly compete on the merits with other rental companies such as Hertz, Avis, National and others (*id.* at App. 10 (¶ 20), App. 13-App. 14 (¶ 33), App. 15 (¶ 37), App. 32 (¶ 97)).

When petitioners refused to succumb to the Chrysler/Dollar tying arrangement[2] and lease less desirable and more expensive Chrysler automobiles (tied product), defendants extracted a written agreement from GM which inflicted additional damage on petitioners and other Dollar franchisees. *Id.* at App. 9-App. 10 (¶¶ 17-20), App. 15-App. 16 (¶¶ 38-40). The agreement in essence eliminated virtually any incentive to lease or buy non-Chrysler automobiles. The agreement (*id.* at App. 38-App. 41) provides that GM will not seek "any advertising agreement" with any Dollar franchisee.[3] This exclusionary agreement was in substance and effect a concerted

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[2] Petitioners alleged that many Dollar franchisees did surrender and were forced to lease automobiles from Chrysler on less favorable terms than could readily have been obtained from non-Chrysler manufacturers. App. B at App. 30 (¶ 91).

[3] The agreement was discriminatorily applied, excepting from the agreement the Dollar franchises in Los Angeles, California; Denver, Colorado; and Hawaii. App. B at App. 16 (¶ 43).

refusal to deal if petitioners persisted in using the Dollar name, service marks or logos in advertisements to rent or promote GM cars, as petitioners had done for the previous 25 years. *Id.* at App. 9-App. 10 (¶ 17), App. 15-App. 16 (¶ 40).

The impact on petitioners caused by Dollar's Chrysler-only advertising policy coupled with the GM-Chrysler restrictive agreement was to deprive petitioners and others of discounts/reimbursements they could have obtained on non-Chrysler products. *Id.* at App. 8-App. 10 (¶¶ 13, 17), App. 28 (¶ 83(b)). For example, petitioners alleged that by reason of these policies/agreements, they were deprived from dealing with GM on a competitive basis and lost out on approximately $400,000 per year in advertising allowances they otherwise would have been entitled to from GM.[4] *Id.* at App. 28 (¶ 83(b)), App. 30 (¶ 90). In other words, in the absence of these unreasonably restrictive policies and agreements, petitioners would have been in a position to purchase or lease cars at effectively lower prices and be more competitive.

Finally, as further retaliation and in an attempt to force compliance with the tying arrangement, defendants, among other things: 1) withheld support and financial

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[4] For example, in 1992, petitioners had entered into an agreement with GM to purchase approximately 2,700 GM automobiles and receive an advertising reimbursement of approximately $150 per car if Cassan used the funds to include and promote GM cars in its advertising. App. B at App. 15 (¶ 39). Defendants objected to this arrangement, and consequently Cassan was forced to buy the 2,700 cars *without* receiving the advertising allowance. *Id.* at App. 15-App. 16 (¶ 40).

assistance to Cassan and CMC in retaining their franchise (*id.* at App. 17-App. 20 (¶¶ 45-54)); 2) threatened termination of franchises (*id.* at App. 23-App. 25 (¶¶ 70-73)); and 3) engaged in discriminatory business practices (*id.* at App. 27-App. 29 (¶¶ 82-83)).

PROCEEDINGS BELOW

Petitioners' initial Complaint was filed on July 29, 1994, alleging violations of Section 1 of the Sherman Act and Section 3 of the Clayton Act (15 U.S.C. § 14). Thereafter, on February 17, 1995, the district court, pursuant to Fed. R. Civ. P. 12(b)(6), granted defendants' motion to dismiss the Complaint with leave to amend. App. C at App. 42-App. 45. The district court found that petitioners' Complaint "fail[ed] to specify what contract is involved, in what manner and in which market the restraint of trade allegedly occurs, or the effect of the alleged restraint." *Id.* at App. 43. The district court also dismissed the Clayton Act claim on the ground that the products involved were not covered by that statute.[5] *Id.* at App. 44.

After petitioners filed their First Amended Complaint, the district court granted defendants' motion to stay discovery and on September 29, 1995, granted defendants' motion to dismiss the First Amended Complaint with leave to amend. App. D at App. 46-App. 52. The district court ruled that plaintiffs: 1) "have failed to allege that there was indeed a contract or combination among

[5] Petitioners did not replead their Clayton Act claim nor did they appeal from its dismissal.

plaintiffs and defendants" because plaintiffs "*refused* to accept the alleged tie-in" (*id.* at App. 48 (emphasis in original)); 2) "allegations concerning the GM-Chrysler contract do not constitute" an unlawful arrangement (*id.* at App. 50); 3) "have failed to sufficiently allege defendants' market power over the tying product" with respect to their *per se* tying claim (*id.* at App. 51); and 4) "have failed to plead any actual harm to competition" (*id.*) thereby rendering "the complaint deficient under a rule of reason analysis" (*id.* at App. 52 (footnote omitted)).

On May 28, 1996, the district court granted defendants' motion to dismiss petitioners' Second Amended Complaint without leave to amend which is at issue here. App. B at App. 5-App. 41; App. E at App. 53-App. 55. The district court found, on identical grounds as its earlier Order, that: 1) "there was no agreement between plaintiffs and defendants" because plaintiffs refused to accept the defendants plan to tie (App. E at App. 54); 2) plaintiffs' failure to properly allege that defendants have substantial market power precludes a *per se* offense (*id.*); and 3) plaintiffs' rule of reason claim is insufficiently pled because they "have failed to allege any facts in support of their wholly conclusory allegation that defendants inflicted an actual harm to competition." (*id.*).

On October 30, 1997, the Ninth Circuit Court of Appeals affirmed the district court's dismissal of the Second Amended Complaint with prejudice. The Ninth Circuit's bottom line holding was that petitioners "have stated no set of facts upon which to find either an agreement or an unreasonable restraint on trade." App. A at App. 2. The two subsidiary erroneous and confusing

rulings to the Ninth Circuit's conclusion, which are the subject of this petition, are as follows:[6]

1. No tying agreement was properly pled because petitioners "never were required to purchase Chrysler cars (the 'tied' product)." App. A at App. 3. The Ninth Circuit also found inapplicable the Sixth Circuit's decision in *Ware v. Trailer Mart, Inc.*, 623 F.2d 1150 (6th Cir. 1980). App. A at App. 3; and

2. Petitioners' "complaint asserts only a conclusory allegation" of harm to competition. App. A at App. 4. Cited as support for this dubious proposition is the Ninth Circuit's earlier decision in *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 735-36 (9th Cir. 1987), finding that a conclusory allegation of an intent to harm competition in a complaint is insufficient to withstand a motion to dismiss. App. A at App. 4.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S DECISION FINDING THAT PETITIONERS FAILED TO PLEAD THE EXISTENCE OF CONTRACTS OR AGREEMENTS IN RESTRAINT OF TRADE CONFLICTS WITH CONTROLLING DECISIONS OF THIS COURT

The Ninth Circuit, not fully affording the proper breadth of tying jurisprudence, found that no tying

[6] The Ninth Circuit also affirmed the district court's finding that petitioners "cannot meet a per se analysis" because market power could not be established. App. A at App. 3.

"agreement existed here because [petitioners] never were required to purchase Chrysler cars (the 'tied' product), regardless of whether [petitioners] entered or resisted the arrangement." App. A at App. 3. As explained below, this holding misses the point.

Indeed, petitioners wanted continued untrammelled use of the Dollar name, service marks and logos (tying product) to advertise non-Chrysler automobiles in order to obtain advertising allowances and other subsidies from competing manufacturers of Chrysler which effectively lowered petitioners' price of acquiring automobiles to rent to consumers. Defendants' conduct in the form of the Chrysler/Dollar policy, working in tandem with the GM-Chrysler anti-advertising agreement, prevented petitioners from receiving GM advertising allowances. This injury was incurred because petitioners resisted the tying arrangement and instead purchased automobiles from Chrysler's competitor. Defendants' conduct, therefore, violates Section 1 of the Sherman Act as a traditional unreasonable restraint on trade and/or a tying arrangement. *See Standard Oil Co. v. United States*, 221 U.S. 2, 31 S. Ct. 502 (1911); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 690, 98 S. Ct. 1355, 1364 (1978); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4-5, 78 S. Ct. 514, 517-18 (1958); *International Salt Co. v. United States*, 332 U.S. 392, 398, 68 S. Ct. 12, 16 (1947); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S. Ct. 2072 (1992).

II.

THE NINTH CIRCUIT'S HOLDING THAT AN ANTITRUST PLAINTIFF MUST ACTUALLY BE FORCED TO PURCHASE BOTH THE TYING AND TIED PRODUCTS IN ORDER TO ESTABLISH A SECTION 1 OF THE SHERMAN ACT VIOLATION IS IN DIRECT CONFLICT WITH THE SIXTH CIRCUIT'S DECISION IN *WARE*

The finding of the Ninth Circuit that no tying agreement can exist because petitioners were never required to purchase Chrysler cars (tied product) (App. A at App. 3) is in direct conflict with the tying law espoused by the Sixth Circuit. This conflict should be rectified or clarified so as to facilitate uniformity among the lower courts in applying and interpreting antitrust tying law.

In *Ware v. Trailer Mart, Inc.*, 623 F.2d 1150 (6th Cir. 1980), the plaintiff challenged a mobile home park owner's practice of tying leased space in its mobile home park to the purchase of a new mobile home. The plaintiff refused to purchase a new mobile home ("the tied product") from the defendant since he already owned one. The district court granted the defendant's summary judgment on the grounds that the plaintiff had no standing to sue under the Sherman or Clayton Acts. *Id.* at 1152. The Sixth Circuit reversed, rejecting the defendant's argument that the plaintiff could not sue under the Sherman Act because the plaintiff had not actually purchased the tied product. The Sixth Circuit held that an antitrust plaintiff suffers injury when it incurs financial losses as a result of the defendant's antitrust violations. *Id.* at 1153.

In *Ware*, the Sixth Circuit concluded that the plaintiff had suffered such an injury because he had to pay storage

charges for his mobile home at another location *and* pay rent for an apartment. *Id.* Thus, the plaintiff was entitled to sue for damages for the alleged violation of Section 1 of the Sherman Act, even though the plaintiff never bought the tied product. Accordingly, *Ware* rejects the notion that the purchase of the tied product is a prerequisite to stating a claim for relief under Section 1 of the Sherman Act.[7]

Here too petitioners have suffered antitrust injury from the existence of defendants' restrictive policies and agreements. Although petitioners did not actually lease Chrysler cars, their businesses suffered competitively because of their inability to advertise in a similar manner as their rental car competitors. Further, they were monetarily damaged because they could no longer receive advertising allowances, discounts or other incentives from Chrysler's competing manufacturers, such as GM.

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[7] *See also Unibrand Tire & Product Co. v. Armstrong Rubber Co.*, 429 F. Supp. 470, 474 (W.D.N.Y. 1977) ("Because it is not alleged that [the plaintiff] purchased any of the tied products, it has no direct claim for relief from the tying arrangement under Section 3 of the Clayton Act (15 U.S.C. § 14). Rather, it is limited to relief under Sherman Antitrust Act § 1 and § 2 (15 U.S.C. §§ 1 and 2).").

III.

THE NINTH CIRCUIT'S DECISION, WHICH MISCONSTRUES OR IGNORES PETITIONERS' ANTITRUST INJURY OR HARM TO COMPETITION ALLEGATIONS ON THEIR FACE, DISREGARDS THE DIRECTIVE OF THIS COURT'S OPINION IN *KODAK* AND OTHER RELEVANT DECISIONS

Analysis of the conflict between the Ninth Circuit's decision and this Court's antitrust body of law begins with *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986). In *Matsushita*, various American electronics manufacturers alleged that Japanese competitors conspired for 20 years to price below cost in the United States in expectation of expanding their market share in the future. After *detailed discovery* had taken place, the Court found untenable the plaintiffs' theory that the Japanese manufacturers had incurred 20 years of losses with the hope that they might someday recoup those losses. *Id.* at 588, 596-98, 106 S. Ct. at 1356-57, 1361-62. Accordingly, this Court held that a reasonable jury viewing that evidentiary record could not return a verdict for plaintiffs and that summary judgment would be appropriate. *Id.*

Unfortunately, too many lower courts used *Matsushita* as an excuse to run rampant, exceeding the bounds of a common sense precedent by too often granting summary judgment or dismissing justiciable claims. *See* Stephen Calkins, *Supreme Court Antitrust 1991-92: The Revenge of the Amici*, 61 Antitrust L.J. 269, 298 (1993) ("Many courts have viewed [*Matsushita*] as a license for the trial court to examine plaintiffs' theories critically at early stages of litigation. *Matsushita* emboldened courts to

address the merits at early stages. . . . " (footnote omitted)).

In *Kodak*, this Court clarified *Matsushita*. With very limited and truncated discovery by the parties, in *Kodak*, the district court had granted summary judgment on the basis of Kodak's economic argument purportedly demonstrating that competition among equipment manufacturers ensured that service customers would suffer no anticompetitive effect. This Court reversed, and rejected the idea that the argument was as a matter of law true in every case and held that summary judgment had been improperly granted:

> Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.' *Maple Flooring Manufacturers Assn. v. United States*, 268 U.S. 563, 579 (1925);. . . .

Kodak, 504 U.S. at 466-67, 112 S. Ct. at 2082.

The result reached by the Ninth Circuit here conflicts with *Kodak*'s insistence – based on precedent as time-honored as *Maple Flooring* – that antitrust claims are to be resolved upon a fully developed evidentiary record.

In short, the Ninth Circuit's approach does more than merely reach an unjust result in this particular case. It is a direct assault on this Court's antitrust jurisprudence as enunciated in *Kodak*. In that case, and others, this Court made clear that antitrust cases should be resolved by fact-

finders upon evidence, not by judges in summary proceedings with a sparse, or no, fact record. The present case demonstrates that some lower courts still have not absorbed that message. Unless this Court makes a strong statement about the proper circumstances for dismissing antitrust cases before trial, some lower courts will continue to usurp the role of the jury. They will persist in distorting antitrust doctrine, to the ultimate detriment of the consumers whom the Sherman Act was designed to protect.

A. FED. R. CIV. P. 8 ONLY REQUIRES A SHORT AND PLAIN STATEMENT; A HEIGHTENED STANDARD OF PLEADING IS NOT IMPOSED IN ANTITRUST CASES

In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168, 113 S. Ct. 1160, 1163 (1993), this Court made clear that no "heightened pleading standard" exists for complex civil cases or any other type of case.[8] Indeed, this Court forcefully explained:

> We think that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules. Rule 8(a)(2) requires that a complaint include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' In *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2

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[8] The only exception is the requirement of Fed. R. Civ. P. 9(b) that averments of fraud or mistake be pled with particularity.

L.Ed.2d 80 (1957), we said in effect that the Rule meant what it said:

> '[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' *Id.*, at 47, 78 S.Ct., at 103 (footnote omitted).

Id.; see also United States v. Employing Plasterers' Ass'n, 347 U.S. 186, 189, 74 S. Ct. 452, 454 (1954) ("[W]here a bona fide [antitrust] complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified."); *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 568 n.15, 107 S. Ct. 1410, 1417 n.15 (1987) ("Under the Federal Rules of Civil Procedure [Rule 8], respondent had no duty to set out all of the relevant facts in his complaint.").

In *Jackson v. Marion County*, 66 F.3d 151, 153 (7th Cir. 1995), Judge Posner writing for the court opined: "*Leatherman* makes clear that the federal courts are not to interpolate a requirement of fact pleading into the federal rules." In unequivocal terms Judge Posner further explained that "a plaintiff in a suit in federal court need not plead facts; he can plead conclusions." *Id.*

The Ninth Circuit's dismissal of petitioners' antitrust injury/harm to competition allegations as "conclusory" (App. A at App. 4) eviscerates the notice pleading standard of Fed. R. Civ. P. 8 and that set forth repeatedly by

this Court. The heightened pleading or "fact" pleading requirement imposed by the Ninth Circuit in this case, and others, is misguided and needs to be corrected. *See, e.g., Rutman*, 829 F.2d at 735-36 (disregarding conclusory language of intent to harm competition); *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988) ("[C]onclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim."); *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924, 928 (9th Cir. 1994) (same); *SmileCare Dental Group v. Delta Dental Plan, Inc.*, 88 F.3d 780, 783 (9th Cir.) (conclusory allegations are insufficient), *cert. denied*, 117 S. Ct. 583 (1996).[9]

In *Jackson*, Judge Posner also provided his insight as to the cause of the recent and growing trend of the district courts in dismissing civil suits at the earliest practicable time short of trial and with little, if any, discovery:

> The pressure of heavy caseloads in the district courts (filings per judge rose from 341 in 1960 to 537 in 1993, and over this same interval

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[9] Other circuits have similarly gone astray. *See, e.g., Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 805 (6th Cir. 1988) ("The essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint on a defendant's 12(b)(6) motion."); *Lombard's, Inc. v. Prince Manufacturing, Inc.*, 753 F.2d 974, 975 (11th Cir. 1985) (court dismisses antitrust claims based upon conclusory nature of the allegations), *cert. denied*, 474 U.S. 1082 (1986); *Mountain View Pharmacy v. Abbott Laboratories*, 630 F.2d 1383, 1387 (10th Cir. 1980) (" '[A] complaint dealing with . . . an antitrust action . . . will be more extended and may require more particularity.' " (citation omitted)).

> the number of trial days tripled although the number of judges increased by only two and a half times) has placed strains on the Federal Rules of Civil Procedure. Those rules, drafted at a time when the federal courts were less busy, may, though constantly amended, not have kept up with the growth in federal litigation. Increasingly the rules are bent – Rule 56 to allow cases that formerly would have gone to trial to be disposed of on summary judgment, Rules 8 and 12 to allow cases that formerly would have gotten at least as far as summary judgment to be decided on the pleadings. Richard L. Marcus, "The Revival of Fact Pleading Under the Federal Rules of Civil Procedure," 86 *Colum.L.Rev.* 433, 444-51 (1986); Thomas E. Willging, "Use of Rule 12(b)(6) in Two Federal District Courts" 18 (FJC Staff Paper, Federal Judicial Center, July 1989). Most judges are pragmatists, and will allow rules to be bent when the pressure is great. But "bent" does not mean "broken." *Architectural Metal Systems, Inc. v. Consolidated Systems, Inc.*, 58 F.3d 1227, 1232 (7th Cir. 1995).

Jackson, 66 F.3d at 153.

Civil litigants with meritorious claims should be afforded the full benefits of the liberal notice pleading provisions of the Federal Rules of Civil Procedure. Justice is not served by permitting such litigants to fall prey to the congestion of the district courts and the perceived pressure on judges to turn and trim their caseloads.

B. PETITIONERS' COMPLAINT PROPERLY ALLEGES HARM TO COMPETITION

Motions to dismiss "should be granted very sparingly." *Hospital Building Co. v. Trustees of the Rex Hospital*, 425 U.S. 738, 746, 96 S. Ct. 1848, 1853 (1976). "[T]he purpose of pleading is to facilitate a proper decision on the merits." *Conley*, 355 U.S. at 48, 78 S. Ct. at 103. Therefore, for purposes of a motion to dismiss, the material allegations of the complaint must be accepted as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984); *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S. Ct. 1843, 1849 (1969). Moreover, a district court may not order dismissal unless it appears that the plaintiff could not prove any set of facts in support of its claim which would entitle it to relief. *Conley*, 355 U.S. at 45-46, 78 S. Ct. at 102; *Hishon*, 467 U.S. at 73, 104 S. Ct. at 2232. Finally, "the complaint is to be liberally construed in favor of plaintiff. See Fed.Rule Civ. Proc. 8(f)." *Jenkins*, 395 U.S. at 421, 89 S. Ct. at 1849. The Ninth Circuit's decision in the instant action contravened all of these rules of pleading construction.

To succeed on a rule of reason claim under Section 1 of the Sherman Act, an antitrust plaintiff must prove that the restraint in question injures competition in the relevant market. *See Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 29-30, 104 S. Ct. 1551, 1567 (1984). Liberally construed, as it must be, Paragraphs 94 through 97 of the Second Amended Complaint under the heading "Effect of the Violations" properly allege the requisite anticompetitive effect and harm to competition, not just

plaintiffs themselves. For example, Paragraph 94 in notice pleading form succinctly alleges:

> 94. The intended effect of the antitrust violations herein alleged is to eliminate competition in the leasing of automobiles to Dollar franchisees, and thus to injure competition in the purchase, renting and resale of cars in the rent-a-car industry in or about the Seattle-Tacoma and Portland airports.

App. B at App. 32 (¶ 94).[10]

Had petitioners been permitted to develop a factual record they likely would have developed the following facts sufficient to allow a jury to find harm to competition, *inter alia*: 1) other Dollar franchisees were subjected to the same unlawful restraints; 2) competition among manufacturers for the leasing or selling of automobiles to Dollar franchisees was lessened; 3) price competition among rental car operators for car rentals was stifled or reduced because the restraints precluded petitioners from

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[10] *See also* App. B at App. 9 (¶ 13) ("offenses hereinafter stated restrain trade in interstate commerce and damage competition in the rent-a-car industry"); *id.* at App. 10 (¶ 20) (defendants' "actions have substantially injured plaintiffs and competition in the rent-a-car industry"); *id.* at App. 13 (¶ 29) (defendants knew that the restraint would "cause financial harm to plaintiffs, diminish the vigorous competition plaintiffs traditionally provided and thus injure the consumers in plaintiffs' operating territories"); *id.* at App. 14 (¶ 33) ("[d]efendants' actions diminish plaintiffs' abilities to compete and thus injure that competition [*i.e.*, rental car business in Seattle and Portland]"); *id.* at App. 12 (¶ 28), App. 14 (¶ 35), App. 15 (¶ 37), App. 17 (¶ 44), App. 19-App. 20 (¶ 52), App. 21 (¶ 59), App. 29 (¶ 83(g)), App. 31 (¶ 93).

obtaining cars from non-Chrysler manufacturers at lower prices which would have sparked price competition; 4) the restraints caused petitioners to be less vigorous competitors against their bigger competitors (*e.g.*, Hertz, Avis, National) to the detriment of overall competition and consumers; and 5) consumers were denied the benefits of free and open competition and freedom of choice for the rental of cars.[11]

The harm to competition that flows from tying arrangements was perhaps most aptly articulated by this Court in *Northern Pacific*:

> Indeed 'tying agreements serve hardly any purpose beyond the suppression of competition.' *Standard Oil Co. of California and Standard Stations v. United States*, 337 U.S. 293, 305-306, 69 S.Ct. 1051, 1058, 93 L.Ed. 1371 [(1949)]. They deny competitors free access to the market for

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[11] Recently, lower courts, including the Ninth Circuit, have expanded the "antitrust injury" requirement imposed by Section 4 of the Clayton Act to require some showing of some injury to consumers as well as competition. *See, e.g., Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1433, 1445 (9th Cir.) (The "reduction of competition does not invoke the Sherman Act until it harms consumer welfare" and "because the Sherman Act's concern is consumer welfare, antitrust injury occurs only when the claimed injury flows from acts harmful to consumers."), *cert. denied*, 516 U.S. 987 (1995); *Stamatakis Industries, Inc. v. King*, 965 F.2d 469, 471 (7th Cir. 1992); *Chicago Professional Sports Ltd. Partnership v. NBA*, 961 F.2d 667, 670 (7th Cir.) ("Whenever producers invoke the antitrust laws and consumers are silent, this inquiry becomes especially pressing."), *cert. denied*, 506 U.S. 954 (1992). Petitioners' allegations, taken as a whole, also met the consumer injury requirement.

> the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons 'tying agreements fare harshly under the laws forbidding restraints of trade.' *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 606, 73 S.Ct. 872, 879, 97 L.Ed. 1277 [(1953)].

356 U.S. at 6, 78 S. Ct. at 518 (footnote omitted).

In sum, petitioners' allegations of antitrust injury/harm to competition were at the very least sufficient under "notice" pleading standards and should not have been dismissed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CASSAN ENTERPRISES, Cassan Enterprises, Inc.; CMC INVESTMENTS; TODD INVESTMENT COMPANY, Plaintiff-Appellants, v. CHRYSLER CORPORATION; DOLLAR SYSTEMS, INC.; RENT A CAR SYSTEMS, INC.; PENTASTAR TRANSPORTATION GROUP, INC., Defendants-Appellees.	No. 96-35727 DC No. CV94-01121-BJR MEMORANDUM* (Filed Oct. 30, 1997)

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, District Judge, Presiding

Argued and Submitted October 8, 1997
Seattle, Washington

Before: WRIGHT, SKOPIL and TROTT, Circuit Judges.

Appellants, car rental franchisees, appeal the district court's Fed. R. Civ. P. 12(b)(6) dismissal of a claim against

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

their franchisor and its owners for an illegal tying agreement in restraint of trade. We affirm the district court's dismissal with prejudice.

We review de novo a Fed. R. Civ. P. 12(b)(6) dismissal for failure to state a claim. *Lewis v. Telephone Employees Credit Union*, 87 F.3d 1537, 1545 (9th Cir. 1996).

A violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1994), requires three elements: (1) the existence of "a contract, combination or conspiracy, *i.e.*, an agreement or concerted action toward a 'common goal' "; (2) an unreasonable restraint on trade, under either a per se rule of illegality or a rule of reason analysis; and (3) an effect on interstate trade. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 632-33 (9th Cir. 1987). Appellants have stated no set of facts upon which to find either an agreement or an unreasonable restraint on trade.

1. Existence of an Agreement

In a tying arrangement, "the competitor agrees to sell the tying product . . . only *on the condition* that its customers also purchase the tied product. . . . " *Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1423 (9th Cir. 1995) (emphasis added).

At oral argument, Appellants cited *Ware v. Trailer Mart, Inc.*, 623 F.2d 1150 (6th Cir. 1980) for the proposition that a tying arrangement exists even when the parties never enter into an agreement. In *Ware*, a mobile home park tied mobile home purchases by prospective tenants to trailer park leases and the issue was whether plaintiff

had standing to assert injury before having entered the coercive agreement.

We find *Ware* inapplicable. There the agreement, once entered, was a classic tying arrangement: a forced purchase. No such agreement existed here because Appellants never were required to purchase Chrysler cars (the "tied" product), regardless of whether Appellants entered or resisted the arrangement.

2. Unreasonable Restraint on Trade

Three elements establish a *per se* violation of the Sherman Act:

> (1) a tie-in between two products or services sold in different markets, (2) *market power* in the tying product, and (3) the tying arrangement affects a not insubstantial volume of commerce.

Datagate, Inc., 60 F.3d at 1423-24 (emphasis added).

Appellants could not assert such market power through a "supracompetitive price" difference, *see Hirsh v. Martindale-Hubbell, Inc.*, 674 F.2d 1343, 1349 (9th Cir. 1982), and Appellees' market power cannot be presumed from their ownership of the Dollar Rent A Car trademark, *see Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1346 (9th Cir. 1987) ("Market power, if any, is derived from the product, not from the name or symbol as such."). Appellants thus cannot meet a per se analysis.

To violate the rule of reason, an agreement must have "unreasonably restrained competition." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29 (1984). This means that an antitrust violation must harm competition, not

just competitors. *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 812 (9th Cir. 1988). Contrary to Appellants' assertion at oral argument, this standard is not made more lenient by *Rebel Oil Company, Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995). *See id.* at 1433 ("[A]n act is deemed *anticompetitive* under the Sherman Act only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality.").

Appellants' complaint asserts only a conclusory allegation of such harm. This is insufficient. *See Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 735-36 (9th Cir. 1987) (disregarding conclusory language of intent to harm competition).[1]

AFFIRMED.

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[1] We decline to reach Appellees' argument that the *res judicata* effects of another suit between these parties precludes this suit.

APPENDIX B

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

CASSAN ENTERPRISES, INC., CMC INVESTMENTS, INC., and TODD INVESTMENT COMPANY, Plaintiffs, vs. CHRYSLER CORPORATION, DOLLAR SYSTEMS, INC., DOLLAR RENT-A-CAR SYSTEMS, INC., and PENTASTAR TRANSPORTATION GROUP, INC. Defendants.	CASE NO. C94-1121R **SECOND AMENDED COMPLAINT FOR VIOLATION OF SECTION 1 OF THE SHERMAN ACT** **JURY TRIAL DEMANDED** (Filed Nov. 3, 1995)

This Second Amended Complaint is filed with permission of the Court. Plaintiffs continue to believe that a package consisting of a franchise agreement and the franchisor's trademarks and logos constitutes "wares" and "merchandise" as those terms are used in Section 3 of the Clayton Act (15 U.S.C. 14) and preserves the point, but this Second Amended Complaint, in the interest of directness, pleads only a violation of Section 1 of the Sherman Act (15 U.S.C. 1), on a *per-se* or rule-of-reason basis.

This proceeding is brought under the provisions of Section 4 of the Clayton Act (15 U.S.C. § 15) for violations of Section 1 of the Sherman Act (15 U.S.C. § 1).

THE PARTIES

1. Plaintiff Cassan Enterprises, Inc. ("Cassan") is a Washington corporation which entered into a franchise agreement November 8, 1967 by which Cassan was granted an exclusive franchise to operate what has now become known as a "Dollar Rent A Car" franchise in a designated area in the State of Washington (the "Seattle" Franchise").

2. Plaintiff CMC Investments, Inc. ("CMC") is a Washington corporation, all of the stock which is owned by Cassan. CMC began operating as a sub-franchisee of Cassan at approximately February 28, 1988, and is now operating as a sub-franchisee in the area covered by the Seattle Franchise.

3. Plaintiff Todd Investment Company ("Todd") is an Oregon corporation which entered into a franchise agreement March 19, 1973, by which Todd was granted an

exclusive franchise to operate what has become known as a "Dollar Rent A Car" franchise in a designated area in the State of Oregon (the "Portland Franchise").

4. Defendant Chrysler Corporation ("Chrysler"), a foreign corporation, one of three major automobile manufacturers in the United States, is hereby made a defendant herein. It completely controls the other defendants named below.

5. Defendant Dollar Systems, Inc. is a Delaware corporation ("Dollar Delaware") which has by events unknown to the plaintiffs taken over the management and control of the Dollar Franchise operation and purports to have the right to, and undertakes to, function as the franchisor respecting the Portland Franchise and the Seattle Franchise.

6. Defendant Dollar Rent A Car Systems, Inc. is a California corporation ("Dollar California") incorporated in 1965 and previously named Dollar A Day Rent A Car, or Dollar A Day Rent A Car, Inc. Dollar California is the franchisor of the Portland Franchise and the Seattle Franchise.

7. Defendant Pentastar Transportation Group, Inc. ("Pentastar") is a foreign corporation which owns Dollar Delaware and Dollar California. Pentastar controls Dollar California, Dollar Delaware and other concerns using the name "Dollar" which function in the rental car business.

8. Pentastar is owned and controlled by Chrysler Corporation.

9. Pentastar directs and controls all of the actions of Dollar California and Dollar Delaware and has directed

and orchestrated all of the acts of Dollar California and Dollar Delaware referred to in this complaint.

10. Dollar California, Dollar Delaware and Pentastar own or are related by stock ownership to a number of corporations which do business under the name "Dollar" or "Dollar Rent A Car" and whose identity is unknown to plaintiffs. Such entities have confusingly similar names and utilize stationery, issue bulletins and send other writings to plaintiffs without identifying the exact name of the entity, which purports to be operating as "Dollar" or "Dollar Rent A Car."

11. Plaintiffs do not know whether Dollar California has transferred some or all of its interest in the Portland Franchise and/or the Seattle Franchise to some other entity, nor do plaintiffs know if Pentastar is still in business or has transferred some or all of its operations to other persons or entities.

12. Plaintiffs reserve the right to add as defendants such other identities as are appropriate parties to this litigation.

NATURE OF THE ACTION

13. Plaintiffs bring this antitrust claim to obtain damages and injunctive relief because of anticompetitive practices of the Chrysler Corporation ("Chrysler") and its subsidiary and affiliated companies herein names as defendants. These include (a) a tying arrangement that is unlawful under Section 1 of the Sherman Act (15 U.S.C. § 1) on a *per-se* basis or a rule-of-reason basis, which resulted in a coerced agreement that plaintiffs would not

use the logo on non-Chrysler cars; (b) a deliberate attempt to destroy or cripple plaintiffs as competitors in the rent-a-car industry in Seattle and Portland after they resisted defendants' unlawful tie-in agreements; (c) an interference with contractual relations and prospective advantageous business relations between plaintiffs and General Motors Corporation ("GM"). The offenses hereinafter stated restrain trade in interstate commerce and damage competition in the rent-a-car industry; and independently (d) a written agreement between Chrysler and General Motors that General Motors would not deal with plaintiffs if plaintiffs used the Dollar logo and trademarks in the sale of GM cars, although plaintiffs had dealt with GM on that basis for some 25 years.

14. Defendants, through Dollar California, own and control the name "Dollar-A-Day Rent-A-Car" and various derivatives thereof as Service Marks in connection with certain designs or logos.

15. The plaintiffs have been granted the Seattle Franchise and the Portland Franchise which gives them the right to use the Dollar trade name, Service Marks and Logos in the operation of their business.

16. The Chrysler defendants, shortly after buying Dollar, conceived and executed a plan which it forced plaintiffs to accept to prohibit use of the Dollar name and logo in advertising, except on condition that the Dollar name and logo be used with Chrysler cars. This provision was not in the Dollar franchise agreements as plaintiffs carried on the business over a 25-year period.

17. Chrysler also procured an agreement with General Motors Corporation (hereinafter referred to as "GM")

that GM would stop dealing with plaintiffs except on a discriminatory basis which involved withdrawal of certain advertising allowances GM had granted plaintiffs in the past and customarily grants to its rent-a-car buyers. This agreement involved a commitment by GM to refrain from dealing with plaintiffs on the competitive merits as they had done over a 25 year period, and was in substance and effect a concerted refusal to deal in plaintiffs used the Dollar logo and trademark to market GM cars as they had done for at least 25 years. The assertion in the contract that it was being done to avoid "contributory infringement" was false because plaintiffs had rights to market GM cars under Dollar logos and trademarks, and had in fact done so for 25 years, and GM knew it.

18. The arrangements which plaintiffs had with GM were economically superior to the arrangements which Chrysler offered plaintiffs.

19. The purpose and intent of the Chrysler defendants were to use their dominance in the trademark and logos to force franchisees to lease the less desirable Chrysler products.

20. When plaintiffs resisted Chrysler's unlawful demands, Chrysler instituted a series of retaliatory actions to drive plaintiffs out of business, and up to this date those actions have substantially injured plaintiffs and competition in the rent-a-car industry.

JURISDICTION AND VENUE

21. This claim arises out of a violation of Section 1 of the Sherman Act (15 U.S.C. § 1). This Court has jurisdiction over this claim and over these defendants, and venue is proper in this district, under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26) and under 28 U.S.C. §§ 1331, 1332 and 1337.

22. Each of the defendants named herein is found and transacts business in the above-entitled District.

23. All of the defendants and plaintiffs in this claim operate in interstate commerce, and defendants' practices affect interstate commerce.

BACKGROUND FACTS
DOLLAR SERVICE MARK AND LOGO

24. Dollar California obtained registration from the United States Patent and Trademark Office covering the use of the name "Dollar-A-Day Rent-A-Car" and various derivations thereof as Service Marks ("Dollar Service Marks") in connection with certain designs ("Dollar Logos"), as limited by the actual registrations, for "rental and leasing" of vehicles only.

25. The Seattle Franchise and the Portland Franchise granted plaintiffs the right to use, and created certain obligations to use, the Dollar trade name, Service Marks and Logos in plaintiffs' businesses, and they did so over a period of many years, until Chrysler acquired plaintiffs' franchisor for $103,000,000 and interpreted the franchise agreements to permit a tie-in between the franchise, its trademark and logos, and Chrysler cars.

26. From the time that Cassan was granted the Seattle Franchise, and from the time Todd was granted the Portland Franchise, the plaintiffs utilized the name "Dollar Rent A Car" (and the predecessor name "Dollar-A-Day Rent-A-Car") in their advertising as required by the two franchises. The plaintiffs utilized the Dollar trade name, Dollar Service Marks and Logos in advertisements featuring automobiles manufactured by GM, Chrysler, Ford, and others for approximately 25 years with the knowledge and consent of Dollar California. During the same period, Dollar California itself advertised automobiles manufactured by GM, Chrysler, Ford and others in national and local advertising in connection with its trade name, the Dollar Service Marks and Dollar Logos. Such course of performance demonstrated the rights of plaintiffs under the franchises.

27. Almost immediately after taking control of the Dollar franchise system, Pentastar directed plaintiffs, and other franchisees, to cease using the Dollar Service Mark or Dollar Logo in advertisements with any automobile manufactured by a competitor of Chrysler.

28. Defendants have continued to restrict plaintiffs from advertising the Dollar Service Marks and Dollar Logos in connection with vehicles manufactured by Chrysler's competitors with a willful and conscious disregard of plaintiffs' rights, and knowledge of the injury which plaintiffs and competition were to and, in fact, did suffer.

29. At the first public meeting that the Dollar Advisory Committee Franchisees held with Pentastar's representatives, the Pentastar representative stated that the

franchisees would either utilize Chrysler automobiles in their rental car business or they would suffer some unstated consequences. Pentastar knew such restriction would, and intended that such restriction would, cause financial harm to plaintiffs, diminish the vigorous competition plaintiffs traditionally provided and thus injure the consumers in plaintiffs' operating territories.

30. Defendants restriction on the use of the Dollar Service Marks and Dollar Logos were made for the benefit of Chrysler Corporation and/or Pentastar, and not for any legitimate business purpose of the Dollar franchise system.

USE OF PLAINTIFFS' NAMES

31. The Portland Franchise authorized the plaintiffs to operate a leasing company under the Dollar Service Mark "without any fees or restrictions" and such provision constitutes either a grant of, or an abandonment of, the protection of the Dollar Service Marks and the Dollar Logos.

32. The Portland Franchise authorized plaintiffs to operate parking facilities using the Dollar Service Marks and the Dollar Logos, subject to the terms of the Portland Franchise, without compensation, and such provision constituted a royalty free license to operate parking facilities in the territories covered by the two Franchise Agreements.

33. Cassan and Todd have used the trade names "Dollar Parking," "Dollar Park & Fly," "Dollar Airport Parking," "Dollar Truck Rental," "Dollar Leasing & Sales"

and "Dollar Car Sales" ("Plaintiffs' Names") in their businesses, all with the full knowledge, consent and acquiescence of Dollar California for periods up to 25 years. Dollar California made no effort to control, supervise or set standards for the use by plaintiffs of the Plaintiffs' Names. The plaintiffs, in reliance upon such consent, acquiescence and encouragement, expended sums of money to advertise and promote Plaintiffs' Names, so that Plaintiffs' Names have come to identify plaintiffs' businesses in plaintiffs' market areas. Plaintiffs' Names and the use thereof are valuable assets of plaintiffs, and neither defendants nor any other person have used Plaintiffs' Names in plaintiffs' market areas. Plaintiffs have been vigorous competitors in the rent-a-car industry in the areas of the Seattle and Portland areas. Defendants' actions diminish plaintiffs' abilities to compete and thus injure that competition.

34. The course of performance of the parties alleged above constituted an interpretation of the two Franchise Agreements that plaintiffs were granted the right to use the Plaintiffs Names without control by Dollar California; an interpretation which defendants changed in order to coerce plaintiffs and their customers to buy or lease Chrysler cars.

35. Now after approximately 25 years of reliance by plaintiffs on such consent, acquiescence and encouragement, the defendants are taking intentional steps to deprive plaintiffs of the use of Plaintiffs' Names in conscious disregard of plaintiffs' rights and to the injury of the competitive markets they serve.

36. Defendants continue to take intentional steps to prohibit or restrict plaintiffs from making use of the Plaintiffs' Names.

37. The restriction on the use of the Plaintiffs Names were made for the benefit of Chrysler Corporation and/or Pentastar and not for any legitimate business purpose of the Dollar franchise system and in reckless disregard of the damages to plaintiffs and to competition in the rent-a-car industry the defendants knew would result from such restrictions.

GENERAL MOTORS 1992 CONTRACT

38 Pentastar made a proposal to lease Chrysler automobiles to Cassan for the model year 1992, but Cassan's analysis of the Pentastar proposal compared to the proposal made by GM revealed that the Pentastar proposal would cost Cassan approximately $2,000,000 more than the GM proposal for comparable automobiles for model year 1992.

39. Accordingly, Cassan entered into understandings and agreements with GM to purchase, and Cassan did purchase, approximately 2,700 GM automobiles. Cassan was to receive an advertising reimbursement of approximately $150 per car if Cassan used the money in advertising, which included advertising automobiles manufactured by GM.

40. Plaintiffs allege that Dollar Delaware and Pentastar intentionally interfered with Cassan's contract and/or business expectancy with GM by threatening in apparent dissimulation to sue GM if the plaintiffs advertised

GM cars in association with the Dollar Service Marks or Dollar Logo, and further interfered by directing plaintiffs that they could not engage in such advertising, even though the Dollar Logo and Dollar Service Marks had been extensively advertised in connection with GM automobiles by Dollar California, plaintiffs and other Dollar franchisees for 25 years or longer, and even though Dollar California had consistently advised its franchisees that they could advertise the Dollar logo and trademark with any automobile. A copy of the GM contract is attached hereto as Exhibit A. It constitutes in an [sic] of itself a contract in restraint of trade in that GM agrees with Chrysler to stop dealing with plaintiffs with the same conditions used over a 25 year period.

41. The course of performance of the parties constitute an interpretation of the two Franchise Agreements. GM, as a seller to plaintiffs over an extended period, acknowledged plaintiffs' rights to use the Dollar logos in advertising GM cars.

42. Defendants allowed at least three other Dollar franchisees to advertise GM cars in connection with the Dollar Logos and Dollar Service Marks for the model year 1992 in order that such franchisees could obtain the GM advertising allowance that was denied plaintiffs.

43. Defendants have announced that after 1992 no future advertising of the Dollar Logo and Dollar Service Marks in connection with Chrysler's competition will be permitted. However, other Dollar franchisees with defendants' consent continue to use the Dollar Logo with non-Chrysler products.

44. Defendants knew that but for the interference with the contract with GM, Cassan would have benefitted from the advertising and would have been better able to compete in the Seattle and Portland markets to the benefit of consumers in those markets.

DISCRIMINATION AGAINST CASSAN TO COERCE FORCED USE OF CHRYSLER CARS

45. For a period of approximately 10 years prior to October 1991, Cassan held a license from the Port of Seattle to operate a full service rental car business at the Seattle-Tacoma airport. Licenses to operate as a full service or limited service operator have a limited life and upon expiration come up for bid. A new bid was required to be made in the spring of 1991. A full service rental car operator enjoys the right to have rental counter space at the terminal and to have rental car ready space and service areas in the garage and to have its customer pick-up and return rental cars at the airport garage. Full service rental car operators made a minimum bid for the right to operate as a full service operator and pay rental to the Port of 10 percent of their gross income, or their minimum bid, whichever is greater.

46. The full service and limited service bids were scheduled to be opened February 22, 1991. Because Cassan and CMC believed it was essential to their continued growth to remain a full service operator, they began planning to make a bid which would allow them to retain their position. Cassan obtained an oral commitment from Dollar to provide sufficient financial assistance for Cassan and CMC to retain their position as a full service-

operator at Seattle-Tacoma airport. Dollar had a well-established practice of providing such assistance. At a meeting in Los Angeles on February 16, 1991, Gary Paxton, who had recently become Dollar's president, stated that Dollar would only provide assistance of $50,000 for one year, even though he was specifically told that a bid of $1,200,000 per year was necessary to retain the position as a full-service operator. The financial assistance provided by Dollar to other licensees is one-half, or more, of the shortfall, up to a maximum of one-half or more of the franchise fee owed to Dollar by the franchisee. The shortfall is the difference in the sum payable to the airport under the minimum bid (in this case $1,200,000 per year) and the percentage fee payable to the airport. Dollar restated its unwillingness to provide more than $50,000 the day before the bid. The $1,200,000 per year bid would have been successful, but Cassan did not bid that amount because of Dollar's lack of support, its change of position and other factors. Dollar's withdrawal of its customary subsidy was motivated by its policy to Chrysler cars on plaintiffs.

47. Knowing that defendants had granted reductions in the franchise fees charged to other Dollar franchisees to gain or retain positions on airports over the preceding several years, Cassan requested that defendants provide Cassan with a subsidy to its franchise fee arrangement to enable it to make a competitive bid and remain as a full-service operator.

48. The proposed change would have been in keeping with defendants' announced intention that Thrifty franchisees would operate off-airport, and that Dollar franchisees would operate on the airport.

49. Defendants refused to negotiate any reduction in its franchise fee (except for a subsidy of $50,000 for the first year only), as it had done for others in conscious disregard for the inevitable damage to plaintiffs and to consumers at the airport, and consequently Cassan could not bid a sufficiently high minimum bid to retain its position as a full service rental car operator.

50. But for defendants' intentional failure to negotiate in good faith and deal fairly with plaintiffs, Cassan and CMC would have been able to remain a full service rental car operator at the Seattle-Tacoma airport and continue to offer the vigorous competition against other major rent-a-car companies.

51. Defendants [sic] course of performance created an interpretation of its obligations to the various franchises in the Dollar System, which at a minimum required Dollar to provide assistance to Cassan and CMC.

52. Cassan is now a limited service operator at the Seattle-Tacoma airport as is Thrifty, a competing company which is franchised by Pentastar. As a result of the discrimination, Cassan was also forced to compete with General Rent A Car ("General"), a company owned by Chrysler, later transferred or sold to some other Dollar entity, until that Dollar entity liquidated its ownership of General. Cassan can no longer compete for rental car business with Thrifty and others as successfully as prior to loss of its position as a full service operator. After Chrysler purchased Dollar, Thrifty became an on-airport limited service operator. Therefore, Cassan can no longer compete with Thrifty and others as successfully, with

consequent injury to competition for consumer preference.

53. Cassan and CMC were required to expend more than a million dollars for capital improvement and for equipment purchases as a direct consequence of their inability to make the minimum bid necessary to retain the position as a full service operator.

54. Cassan's and CMC's market share and profits have declined dramatically as a result of being a limited service operator and its ability to compete effectively has thus injured competition int he [sic] relevant markets at the airport.

COMPETITION

55. Dollar California or Dollar Delaware owned and operated General in Seattle – a direct competitor of plaintiffs.

56. Dollar and Pentastar operated General at lower rental rates than plaintiffs' rental car rates, thereby reducing plaintiffs' market share while Pentastar and Dollar were operating General.

57. Dollar and Pentastar granted plaintiffs a first right of refusal to purchase General's rental counter space and other assets located at or near the Seattle-Tacoma airport, but then sold the General rental counter and other assets to Advantage Rent A Car, thereby introducing another rental car company into the Seattle-Tacoma airport as a limited service operator and creating further

unfair competition, and thereby reducing plaintiffs' revenues and its ability to operate on the competitive merits for airport consumers.

58. Pentastar owns other car rental systems which either directly or through subsidiaries or franchisees compete directly with the plaintiffs. Those companies include: Thrifty Rent A Car Systems, Inc., which license Thrifty franchises in plaintiffs' exclusive territories, and Snappy Car Rental, Inc., which are in effect Chrysler corporate stores and license Snappy Car Rentals in plaintiffs' exclusive territories.

59. As a direct result of the competition by Thrifty, Snappy, General, and now Advantage, the plaintiffs have lost market share and have incurred financial losses, and consumers have been injured by reason of plaintiffs' inability to compete on the competitive merits without defendant's retaliatory actions based on its contract interpretation of plaintiffs' franchises to tie in the franchise, its trademarks and logos with the purchase and lease of Chrysler cars.

FREQUENT FLYER PROGRAMS

60. Over the years Dollar California sponsored a number of programs under which arrangements were made with airlines for promotions to benefit the Dollar rental systems. Participation in such programs by franchisees was not required by the Seattle or Portland Franchises, and the parties, by their course of performance, demonstrated their interpretation of the franchise agreements.

61. Dollar California announced that an arrangement had been made with United Airlines ("United") that United's customers would be provided air miles for renting a Dollar car and that participating franchisees would be allowed to issue coupons to rental car customers so those customers could obtain the free mileage for the United Milage [sic] Plus program. Under the program, defendants required participating franchisees to pay $10 for each frequent flyer coupon issued.

62. Plaintiffs advised defendants they would not participate in the program, although they, as team players, would distribute the frequent flyer milage [sic] certificates if Dollar California desired.

63. Defendants pay United less than $10 for each frequent flyer certificate given to United customers, and this fact has not previously been made known to plaintiffs.

64. If Cassan and/or CMC are required to pay anything for these promotions, the maximum amount required to be paid for promotions annually under the Seattle Franchise is $300 per year.

65. The Portland Franchise does not require plaintiffs to pay for the frequent flyer program, and Todd has not made any such payments.

FIVE PERCENT DISCOUNT

66. The Portland Franchise allows Todd to deduct from its gross revenue, upon which the franchise fee is payable, "credit card discounts and commissions actually paid . . . " up to 5% of Todd's gross revenue. Todd has

always deducted such amounts with the full knowledge and approval of defendants. In the audit of Todd's books by defendants in 1992, defendant asserted that such deduction was not authorized.

67. Todd continued to take the 5% discount to which it was entitled after the audit, and the defendants accepted such amounts until defendants gave notice of termination of the franchises as referred to herein when defendants, without any accounting, included $24,560 computed under its then version of the application of the %5 [sic] figure which was not owed in its demand for forfeiture.

68. From the inception of business until February 4, 1994 Cassan, CMC and Dollar California's course of performance demonstrates an interpretation of Seattle Franchise to allow the deduction of up to 5% for credit card discounts, travel agent commissions and other promotional fees in determining the revenue upon which the franchise fee is payable. Such deductions have been made, and knowingly accepted.

69. Defendants, without cause and in bad faith, have changed their position respecting the 5% discount and now contend that only credit card discounts can be deducted from gross receipts. This change of position again is in furtherance of defendants' tie-in of franchise rights with the purchase or lease of Chrysler cars.

TERMINATION ATTEMPT AND PAYMENT

70. On January 7, 1994 defendant Dollar California notified Cassan that it owed "certain charges incurred in

connection with the License Agreement in an amount in excess of $262,476.83." Although plaintiffs owed, at most, only a small portion of the amounts demanded, they timely paid under protest $262,477.00 in order to eliminate the threat to terminate the Seattle Franchise. No itemization of such charges was then presented, and even after a second request for an itemization was made, no such itemization was provided.

71. On January 7, 1994 defendant Dollar California notified Todd that it owed "certain charges incurred in connection with the License Agreement in an amount in excess of $211,945.63." Although plaintiffs owed, at most, only a small portion of the amounts demanded, they timely paid under protest $211,946.00 in order to eliminate the threat to terminate the Portland Franchise. No itemization of such charges was then presented and even after a second request for an itemization was made, no such itemization was provided.

72. The plaintiffs did not owe the amounts charged, and this was admitted in part by defendants when they finally provided a calculation of the amounts claimed due and determined that even under defendant's computation (which was wrong), Cassan and CMC was entitled to a refund of $10,417.88 and Todd was entitled to a refund of $1,417.87, and such refunds were paid on February 9, 1994. Plaintiffs received another calculation from defendants admitting additional errors amounting to $774.15, which amount was received on February 14, 1994. Defendants acknowledged a credit was also due plaintiffs in the amount of $3,698.15, derived from the original calculations. An amount of $1,679.66 was due, owing to an accounting error made by the defendants. In effect, CMC

owed $469.41 and Todd owed $427.20. This represented amounts owing, not including litigation costs over the frequent flyer program; the audit charges regarding the 5% issue; and the United Express charges. Defendants send [sic] a credit, then erroneously applied it to an amount plaintiffs did not owe. Plaintiffs continue to seek amounts due.

73. Plaintiffs, faced with a well-founded fear that defendants will again attempt to forfeit the plaintiffs' franchise for defendants' own self-serving and predatory purposes, have agreed to comply with defendants' demands and take only discounts for credit cards (even though plaintiffs are entitled to the full 5%) and to pay for frequent flyer coupons issued (until trial). The threats of termination were and are in furtherance of defendants' policy to coerce plaintiffs to accept Chrysler cars under its franchise agreements.

UPGRADES

74. Defendants insisted that plaintiffs provide free upgrades of rental cars to United customers. For example, Dollar California required plaintiffs to rent a car which would normally rent for $29.99 per day, for $19.95 per day.

75. Plaintiffs are entitled to reimbursement from defendants for such upgrades, but defendants have refused to pay such amounts.

76. Defendants have also billed plaintiffs three cents for each passenger deplaning from United Express at the

Seattle-Tacoma airport and the Portland International airport, whether or not any of such deplaning passengers rent Dollar cars. Plaintiffs deny that they are obligated to pay the claimed indebtedness.

77. Defendant have taken the position that plaintiffs are required to accept tour business, which plaintiffs deem unprofitable, and plaintiffs deny any duty to accept such business.

78. Defendants have insisted that Todd's books and records be made available to Pentastar; Todd asserts that only Dollar California, its licensor, be allowed to review its books. Plaintiffs specifically object to the review of such records by Pentastar inasmuch as Pentastar competes with Todd.

79. Defendants contend that they have the right to impose obligations and duties upon plaintiffs by issuing directives, bulletins or rules, whereas plaintiffs contend that any right to impose any such rules or requirements must comply with the franchise agreements, be in the best interest of the Dollar System, and comply with the implied duty of good faith and fair dealing, implied in the franchise agreements.

80. Defendants contend that plaintiffs may not deduct up to 5% from gross receipts for credit card discounts, travel agency fees and other charges for promotion of plaintiffs' business.

81. Defendants have contended that the Seattle Franchise is not perpetual, even though Dollar California agreed that it would be, and the court should resolve this dispute.

INTENT TO DESTROY PLAINTIFFS BUSINESS OR FORCE CHANGE OF FRANCHISES

82. The Seattle Franchise operation has been successful from shortly after its inception, and the Portland Franchise (which failed in the hands of its prior operators) has become successful to the extent that the Portland operation was determined to be one of the best medium hub franchises in the entire Dollar system in 1991 and 1992.

83. Since the time the Seattle Franchise and the Portland Franchise were granted to plaintiffs, the defendants have changed the franchise forms so that the burden on the franchisees are far more onerous for the Seattle and Portland Franchises. The defendants have taken, and are continuing to take steps to destroy plaintiffs businesses, in order to retaliate for plaintiffs insistence upon their legal rights, and for bringing their suit and in order to put plaintiffs out of business, or so damage plaintiffs' businesses that defendants may confiscate the businesses themselves, obtain new franchisees or force plaintiffs to surrender their franchisees and accept the new franchise forms. In furtherance of this plan, the defendants have, since Pentastar took control of the other defendants, done the following acts:

a. Defendants gave notice of termination of the plaintiffs franchises, alleging that plaintiffs owed sums of money which the defendants knew were not owed by plaintiffs, as described in ¶¶ 70 and 71 above. As a consequence, plaintiffs had to pay approximately $475,000 in order to prevent the unlawful termination of their franchises.

b. Defendants prevented Cassan from receiving $400,000 of advertising money from GM, while allowing other franchises to advertise GM cars with the Dollar Service Marks and Logos so that those franchises could obtain the advertising money. Defendants were well aware that Dollar California and Dollar Delaware had allowed such advertising since 1967, and defendants knew that their conduct was wrongful.

c. Discriminating against Cassan and CMC by refusing to make concessions to allow Cassan and CMC to retain their position as full service operators, knowing that such change in status would cause Cassan and CMC far in excess of a million dollars in facilities costs and lost revenue, and weaken their competitive position with Thrifty.

d. Denied plaintiffs the discounts they were entitled to take.

e. Defendants have refused to even consider Todd's request to sell additional shares to Doris Cassan and the vice-president/manager of its Portland operations. The purpose of such sale is to increase the chance that Todd will be classified as a woman-owned business and would thereby have a greater chance to retain its on-airport status at Portland International Airport. If Todd can retain its on-airport status, that would frustrate defendants' plan to destroy plaintiffs' business or gain other unfair advantage as described above.

f. Defendants have denied that the Seattle Franchise is perpetual, even though the president and then sole shareholder of Dollar California agreed it was perpetual in writing.

g. The acts of defendants referred to in ¶¶ 82 and 83 were, and continue to be, oppressive conduct, not based on contract, and subjected plaintiffs to cruel and unjust hardship in disregard of plaintiffs' rights in furtherance of defendants' interpretation of the franchise agreements to require plaintiffs to purchase or lease only Chrysler cars to the exclusion of Chrysler's competitors.

OFFENSES CHARGED

84. Paragraphs 1 through 83 are hereby incorporated by reference.

85. Beginning in 1990 and continuing to the date of this complaint, the defendants have been engaged in a policy to force contracts and combinations in restraint of interstate trade and commerce by tying the right to use Dollar franchise trademarks and logos to the requirement that they be used only in connection with Chrysler automobiles and by agreeing with General Motors to restrict transactions with plaintiffs. The logos and trademarks were purchased by Chrysler for over $100 million dollars, and represent a strong and competitive factor in the rent-a-car industry.

86. The said contracts and combination consists of a plan and scheme to force Dollar franchisees to lease Chrysler automobiles and to stop dealing in automobiles manufactured and sold by other automobile manufacturers, including GM, Ford and the Japanese companies.

87. Franchise rights, including use of trademarks and logos are separate products from automobiles used in the rent-a-car industry. Under the circumstances here

involved, the Dollar franchise with its trademark and logo rights is the dominant commodity and the Chrysler cars, the tied commodity. Dollar does business in the millions in its franchise operations and Chrysler cars used in connection with Dollar operations form a substantial part of interstate commerce.

88. Defendants have substantial market power in the market for rent-a-car franchises with their trademarks and logos, and, as it relates to plaintiffs, this power is virtually monopoly power because plaintiffs have been operating under rights as franchisees for some twenty-five years, with freedom to compete in their business using automobiles from any manufacturer on the competitive merits without coercion in the form of retaliatory restrictions.

89. The amount of commerce affected in the market of buying, renting and re-selling cars is substantial. In 1992, for example, there were millions of dollars of purchases from General Motors by plaintiffs.

90. The grant of franchised privileges to trademarks and logos, being conditioned upon the lease of Chrysler cars, constitute an agreement or agreements within the meaning of Section 1 of the Sherman Act, as does separately the agreement between Chrysler and General Motors disallowing plaintiffs from dealing with General Motors on the competitive merits and gain some $400,000 per year in advertising allowance.

91. Defendants rules and practices act to force many of its Dollar franchisees to lease Chrysler cars instead of cars from other companies of customer's choosing.

92. Thus, Defendants tying arrangements and the steps taken to enforce or coerce their acceptance unreasonably restrain trade and are unlawful under Section 1 of the Sherman Act, either on a *per-se* basis or a rule-of-reason basis.

93. The relevant market to measure the competitive effect of defendants' offenses consists of (a) the purchase or lease of automobiles for use in the rent-a-car business in or about the Seattle-Tacoma and Portland airports; (b) competition between rent-a-car companies in and about the Seattle-Tacoma and Portland airports; and (c) competition for airline customers arriving at the two airports. Plaintiffs, since their inception some twenty-five years ago, have been vigorous competitors for the patronage of arriving customers, in part because of their ability to offer a variety of cars, other than Chrysler cars. Plaintiffs' abilities as competitors depends [sic] in part on their right to exploit competition among car manufacturers domestic and foreign; and defendants' aforesaid conduct has impaired that right. In 1992 alone, plaintiffs' unrestricted access to GM produced a transaction at least $2,000,000 better than Chrysler's tie-in proposal. This enabled plaintiffs the better to compete against other well-known rent-a-car logos and trademarks, and over the years lowered the prices paid by consumers in Portland and Seattle-Tacoma. Correlatively, the inability to use the Dollar on non-Chrysler cars has a tendency to keep consumer prices at a higher level.

EFFECT OF THE VIOLATIONS

94. The intended effect of the antitrust violations herein alleged is to eliminate competition in the leasing of automobiles to Dollar franchisees, and thus to injure competition in the purchase, renting and resale of cars in the rent-a-car industry in or about the Seattle-Tacoma and Portland airports.

95. A specific intent of the violations herein alleged was to injure the plaintiffs in the competitive operation of their businesses and, upon their resistance, to destroy plaintiffs' business by retaliatory punitive anticompetitive behavior, including failure to support plaintiffs' efforts to retain favorable airport locations, and unlawful attempts to terminate plaintiffs' franchises.

96. Plaintiffs have been further injured in their business by the actions of defendants in procuring agreements from GM to discontinue normal business relations with plaintiffs. These agreements were in fact utilized by Chrysler to effect an unlawful allocation of customers between itself and other automobile manufacturers and in and of themselves constitute contracts in restraint of plaintiffs' trade.

97. The violations herein alleged injured competition in the Seattle-Tacoma area by reducing the plaintiffs' ability to compete with Hertz, Avis, National, Thrifty and others, thus raising prices to consumers and diminishing services as against what otherwise would have occurred.

98. By reason of the violations of the antitrust laws herein alleged, plaintiffs have suffered damages in lost

profits, lost advertising allowances, loss of favorable airport locations and status, lost future profits and loss of resale value in their businesses as going concerns. Plaintiffs' losses amount to at least $10,000,000.

WHEREFORE, Plaintiff prays with respect to these antitrust violations:

1) That defendants' tying arrangements and retaliatory actions against plaintiff's be adjudged illegal under Section 1 of the Sherman Act (15 U.S.C. §1), and that they be enjoined;

2) That the contract between Chrysler and GM prohibiting GM to deal with plaintiffs on the competitive merits as they had over a 25 year period be adjudged a contract in restraint of trade, in violation of Section 1 of Sherman Act (15 U.S.C. §1)

3) That plaintiffs have judgment against defendants for damages in at least the sum of $10,000,000, trebled to $30,000,000 as required by Section 4 of the Clayton Act (15 U.S.C. §15);

4) That plaintiffs recover their costs herein and an attorney's fee a [sic] provided by Section 4 of the Clayton Act (15 U.S.C. §15); and

5) That plaintiff receive such other and further relief as the Court deems just and equitable.

Respectfully submitted,

KARR, TUTTLE AND CAMPBELL

Dated: November 3, 1995

By: /s/ Floyd L. Newland
FLOYD NEWLAND, ESQ.
Co-Counsel for Plaintiffs
CASSAN ENTERPRISES, INC.,
CMC INVESTMENTS, INC.
and TODD INVESTMENT COMPANY

DATED: November 2, 1995

Respectfully submitted,

LAW OFFICES OF JOSEPH L. ALIOTO

By: /s/ Joseph L. Alioto
JOSEPH L. ALIOTO
Co-Counsel for Plaintiffs
CASSAN ENTERPRISES, INC.,
CMC INVESTMENTS, INC.
and TODD INVESTMENT COMPANY

JURY TRIAL DEMAND

Plaintiffs respectfully demand a trial by jury on all issues so triable.

Respectfully submitted,

KARR, TUTTLE AND CAMPBELL

Dated: November 3, 1995

By: /s/ _____
FLOYD NEWLAND, ESQ.
Co-Counsel for Plaintiffs
CASSAN ENTERPRISES, INC.,
CMC INVESTMENTS, INC.
and TODD INVESTMENT COMPANY

DATED: November 2, 1995

Respectfully submitted,

LAW OFFICES OF JOSEPH L. ALIOTO

By: /s/ Joseph L. Alioto
JOSEPH L. ALIOTO
Co-Counsel for Plaintiffs
CASSAN ENTERPRISES, INC.,
CMC INVESTMENTS, INC.
and TODD INVESTMENT COMPANY

[LOGO] PENTASTAR
TRANSPORTATION
GROUP

DEPOSITION
EXHIBIT
16

PENTASTAR TRANSPORTATION GROUP, INC.

Wm. E. Lobeck, Jr.
President

October 10, 1991

Mr. J. M. Durrie
General Director
Fleet & Government Sales Section
General Motors Corporation
3044 West Grand Boulevard
10-162 GM Building
Detroit, MI 48202

Re: Pentastar Transportation Group, Inc. –
GMAC Lease Transaction

Dear Mike:

You have requested that Pentastar Transportation Group, Inc. ("Pentastar") waive, for a limited time period, certain provisions of that certain Release and Settlement Agreement entered into between General Motors Corporation ("GM") and Pentastar dated as of March 27, 1991 (the "Agreement"), in consideration for GM agreeing to supply vehicles to Pentastar (and its subsidiaries) for the 1992 model year.

Based on the consideration recited above and due to the inability of certain licensees of Dollar Systems, Inc. ("Dollar") to obtain cars and financing from the manufacturer featured in the Dollar national advertising campaign, Pentastar hereby agrees to waive, only for the 1992 model year, that portion of the Agreement which prohibits GM from entering into or extending advertising agreements with the Dollar licensees listed on Attachment A to the Agreement (which is attached hereto in its entirety).

This is only a limited waiver and only applies for the limited term and to the licensees on Attachment A to the Agreement.

Sincerely,

PENTASTAR TRANSPORTATION GROUP, INC.

/s/ Wm. E. Lobeck
Wm. E. Lobeck, Jr.
President
5330 East 31st Street
P.O. Box 35985
Tulsa, OK 74152-Illegible
918/Illegible 7700
FAX: 918/Illegible

RELEASE AND SETTLEMENT AGREEMENT

THIS RELEASE AND SETTLEMENT AGREEMENT (hereinafter referred to as the "Release") is entered into this 27 day of March, 1991, by General Motors Corporation (hereinafter "G.M.") and Pentastar Transportation Group, Inc. ("Pentastar"). Pentastar owns and has the beneficial interest in Dollar Rent A Car Systems, Inc. and its subsidiary Dollar Systems, Inc. ("Dollar"), and Thrifty Rent-a-Car System, Inc. ("Thrifty").

Whereas, Pentastar claims that G.M. improperly interfered with a contractual arrangement and negotiations between Dollar and Scamp Auto Rental I, Inc. and Lindo Car Rental Company and that G.M. interfered with the business advantage of these Pentastar subsidiaries in connection with its dealings with Lindo (the "Claim");

Whereas, G.M., on one hand, and Pentastar, on the other, desire to settle the dispute without litigation;

Now, Therefore, in consideration of the mutual covenants contained herein, G.M. and Pentastar agree as follows:

1. *Release of Claim.* Pentastar hereby releases and forever discharges G.M. from any and all claims, liens, demands, causes of action, obligations, damages and liabilities, known or unknown, suspected or unsuspected, claimed or unclaimed, asserted or unasserted, that Pentastar has had in the past, or now has, against G.M., arising, directly or indirectly, out of, or related in any way to the allegations, occurrence or subject matter of the Claim.

2. *Deposition.* Pentastar agrees that it will withdraw its discovery subpoena for deposition testimony and the

production of documents pursuant to Federal Rule of Civil Procedure, Rule 30(b)(6) with regard to the deposition of G.M. or its employees in connection with the case of *Thrifty Rent-A-Car System, Inc. v. Kenneth L. Elder, et al.* (Civil Action No. 90-1340-A), that is now pending in the United States District Court for the Eastern District of Virginia. This agreement will not alter the right to introduce into evidence the deposition testimony or documents already obtained pursuant to the subpoena of G.M.

3. *Advertising.* Pentastar represents that the franchise or license agreements of Pentastar subsidiaries give the Pentastar subsidiaries the right to stipulate the manner of advertising and to approve or disapprove any advertising using the subsidiaries' name(s), trademark(s), or service mark(s). Pentastar further represents that the terms of such license or franchise agreement or the subsidiaries' corporate policy provide that the franchisee will not advertise vehicles other than those featured by Pentastar or its subsidiaries. Relying on the foregoing representations, G.M. agrees not to seek any advertising agreement with persons or entities who have license or franchise agreements with Pentastar subsidiaries. This agreement does not alter G.M.'s rights with regard to any existing advertising agreement that G.M. currently has with the Dollar licensees or franchisees listed in attachment "A" to this agreement, during the present term of such existing advertising agreements. G.M. represents that the persons or entities listed in attachment "A" are the only licensees or franchisees of Pentastar subsidiaries with whom G.M. currently has an existing advertising agreement.

4. *Costs and Fees.* Pentastar and G.M. agree that this Release includes all claims for costs, expenses and attorneys' fees, taxable or otherwise, incurred by it in or arising out of the Claim.

5. *No Admission of Liability.* G.M. and Pentastar acknowledge that entering into this agreement does not constitute any admission or concession of liability whatsoever on account of any matters relating to the Claim.

6. *Entire Agreement and Modification.* G.M. and Pentastar mutually agree and warrant that no promise, inducement or agreement not expressed herein has been made to it in connection with this Release, and that this Release constitutes the entire agreement between the parties herein named and supersedes any and all other agreements and negotiations, whether oral or in writing. It is expressly understood and agreed that this Release may not be altered, amended, modified or otherwise changed in any respect whatsoever except by a writing duly executed by authorized representatives of the parties hereto.

7. *Duplicate Originals.* This release may be executed in duplicate originals, each of which is equally admissible in evidence.

GENERAL MOTORS CORPORATION

By /s/ J.M. Durrie

Its General Director –
Fleet & Government Sales

PENTASTAR TRANSPORTATION
GROUP, INC., individually and
on behalf of its subsidiaries

By /s/ Illegible
Its Counsel

ATTACHMENT "A"

Wishcorp (Dollar L.A.)
Trynd (Dollar Denver)
Pacific International (Dollar Hawaii)

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASSAN ENTERPRISES, INC., CMC INVESTMENTS, INC., and TODD INVESTMENT COMPANY, Plaintiffs, v. CHRYSLER CORPORATION, DOLLAR SYSTEMS, INC., DOLLAR RENT-A-CAR SYSTEMS, INC., and PENTASTAR TRANSPORTATION GROUP, INC., Defendants.	NO. C94-1121R ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT (Filed Feb. 21, 1995)

THIS MATTER cones before the court on a motion by defendants Chrysler Corporation, Dollar Systems, Inc., Dollar Rent-a-Car Systems, Inc. and Pentastar Transportation Group, Inc. to disniss plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Having reviewed the motion together with all documents filed in support and in opposition, and being fully advised, the court fincs and rules as follows:

Plaintiffs Cassan Enterprises, Inc., CMC Investments, Inc. and Todd Investment Company filed a complaint alleging the impositior by defendants of unlawful tying arrangements between the Dollar trademark and Chrysler products in violatior of § 1 of the Sherman Act and § 3

of the Clayton Act. Defendants now move to dismiss plaintiffs' claims on the grounds that plaintiffs have failed to state claims on which relief can be granted under the Sherman and Clayton Acts.[1]

First, defendants argue that plaintiffs have failed to allege a contract, combination or conspiracy in restraint of trade as required under §1 of the Sherman Act. Plaintiffs recognize that they cannot rest their Sherman Act claim on a combination or conspiracy among the defendant organizations, but insist that "[s]ection 1 of the Sherman act is implicated because in a tying arrangement the contract between the buyer and seller is the contract or combination in restraint of trade, which makes out the plurality of actors required by Section 1 of the Sherman Act." Pltfs' Mem. in Opp. to Dfts' F.R.C.P. 12(b)(6) Mot., p. 1.

However, plaintiffs' complaint is woefully inadequate in that it fails to specify what contract is involved, in what manner and in which market the restraint of trade allegedly occurs, or the effect of the alleged restraint. As defendants point out in their reply brief, the gravamen of plaintiffs' complaint instead appears to be that defendants attempted to terminate their relationship with plaintiffs because of plaintiffs' steadfast refusal to

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[1] Contrary to plaintiffs' initial argument in opposition to defendants' current motion, this is not defendants' second bite at the 12(b)(6) apple. Defendants' prior motion sought a dismissal or stay of this action pending resolution of another case. Thus, Fed. R. Civ. P. 12(g) does not bar the instant motion. *Aetna Life Ins. Co. v. Alla Medical Services, Inc.*, 855 F.2d 1470, 1474-75 (9th Cir. 1988).

agree to the allegedly unlawful tying arrangement. Thus, the court concludes that defendants are correct in contending that plaintiffs have failed to state a cause of action for violation of § 1 of the Sherman Act based on the current allegations in plaintiffs' complaint.

Second, defendants argue that, under the Clayton Act, the tied and tying products must both be "goods, wares, merchandise, machinery, supplies, or other commodities." *Moore v. Jas H. Matthews & Co., 550 F.2d 1207, 1214 (9th Cir. 1977).* Defendants argue that a franchise trademark is intangible property and thus does not qualify as goods or a commodity. This premise is well supported by caselaw. *See, e.g., Chelson v. Oregonian Pub. Co.,* 715 F.2d 1368, 1372-73 (9th Cir. 1983); *Crossland v. Canteen Corp.,* 711 F.2d 714, 718 n.1 (5th Cir. 1983); *Hodge v. Villages of Homestead Homeowners Ass'n,* 726 F. Supp. 297, 298 (S. D. Fla. 1989); *Webb v. Primo's Inc.,* 706 F. Supp. 863, 869-70 (N.D. Ga. 1988). Plaintiffs' response has no merit, relying as it does on citations to caselaw about tying arrangements under the Sherman Act, which does not contain the same restrictive language about goods and commodities as the Clayton Act.

For the above-stated reasons, defendants' Rule 12(b)(6) motion is GRANTED. Plaintiffs' complaint is dismissed without prejudice to plaintiffs' future refiling of their complaint with additional allegations specifying the nature of the contract or combination on which they base their § 1 Sherman Act claim.

DATED at Seattle, Washington this 17th day of February, 1995.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASSAN ENTERPRISES, INC., CMC INVESTMENTS, INC., and TODD INVESTMENT COMPANY, Plaintiffs, v. CHRYSLER CORPORATION, DOLLAR SYSTEMS, INC., DOLLAR RENT-A-CAR SYSTEMS, INC., and PENTASTAR TRANSPORTATION GROUP, INC., Defendants.	NO. C94-1121R ORDER GRANTING DEFENDANTS' MOTION TO DISMISS (Filed Sep. 29, 1995)

THIS MATTER comes before the court on defendants' motion to dismiss plaintiffs' First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Having reviewed the motion together with all documents filed in support and in opposition, and being fully advised, the court finds and rules as follows:

I. BACKGROUND AND DISCUSSION

On February 17, 1995 this court dismissed plaintiffs'[1] original complaint in this matter for failure to state a claim. Plaintiffs subsequently were permitted to amend

[1] Plaintiffs are Cassan Enterprises, Inc., CMC Investments, Inc., and Todd Investment Company. Plaintiffs are franchisees, or sub-franchisees, operating car rental agencies.

and refile their complaint. Defendants[2] now move to dismiss the First Amended Complaint for failure to state a claim.

Plaintiffs' First Amended Complaint (hereinafter "the Complaint") alleges that defendants have violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiffs seek damages resulting from an alleged unlawful tying arrangement between the Dollar trademark (the alleged tying product), and Chrysler automobiles (the alleged tied product). In their motion to dismiss, defendants argue that plaintiffs' Complaint is deficient in a number of ways. The court agrees. The court addresses several deficiencies below.

A. Elements of a Sherman Act Claim

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. To maintain a Section 1 action, plaintiffs must show:

> (1) that there was a contract, combination, or conspiracy, i.e., an agreement or concerted action toward a "common goal," (2) that the agreement "unreasonably" restrains trade, under either a per se rule of illegality or a rule of reason analysis, and (3) that the restraint affected interstate commerce.

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[2] Named as defendants are Chrysler Corporation, Dollar Systems, Inc., Dollar Rent-A-Car Systems, Inc., and Pentastar Transportation Group, Inc.

T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association, 809 F.2d 626, 632-33 (9th Cir. 1987) (citations omitted).

B. Required Contract, Combination, or Conspiracy

Defendants contend that plaintiffs' allegations of a contract, combination or conspiracy are deficient. Plaintiffs allege that defendants unlawfully tied the right to use the Dollar franchise trademarks and logos to the requirement that they be used only with Chrysler automobiles.

1. Contract Involving Plaintiffs and Defendants

Plaintiffs appear to allege the existence of a contract or combination to which *plaintiffs* and *defendants* were parties. Although a buyer and seller can constitute the necessary combination for purposes of Section 1, plaintiffs have failed to allege that there was indeed a contract or combination among plaintiffs and defendants. Instead, plaintiffs have consistently stated that they *refused* to participate in the defendants' proposed agreement and *refused* to accept the alleged tie-in. Resistance to unlawful trade practices does not create the contract, combination or conspiracy required to maintain a Section 1 Sherman Act claim. *See e.g., Famous Brands, Inc. v. David Sherman Corp.*, 814 F.2d 517, 523-24 (8th Cir. 1987).

2. Contract Involving Defendants and General Motors

Because plaintiffs have not properly alleged a contract or combination involving plaintiffs and defendants, the court must consider whether plaintiffs have alleged a combination in another manner. Plaintiffs allege that defendants entered into an unlawful agreement with General Motors Corporation ("GM") to restrict transactions with plaintiffs. The extent of plaintiffs' factual allegations describing the agreement with GM is as follows:

> 17. Chrysler also procured an agreement with General Motors Corporation (hereinafter referred to as "GM") that GM would stop dealing with plaintiffs except on a discriminatory basis which involved withdrawal of certain advertising allowances GM had granted plaintiffs in the past and customarily grants to its rent-a-car buyers.

Para. 17, First Amended Complaint.

Defendants argue that plaintiffs have not provided sufficiently detailed factual allegations concerning the agreement with GM to survive the motion to dismiss. The court need not reach this argument because it finds persuasive defendants' additional argument that whatever the nature of the alleged agreement between GM and Chrysler, plaintiffs have not alleged that as a result of the GM-Chrysler agreement, plaintiffs were forced to buy Chrysler automobiles.[3] Therefore, plaintiffs have failed to

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[3] Plaintiffs also fail to allege that the alleged agreement between Chrysler and GM prohibited them from purchasing GM automobiles.

allege that the GM-Chrysler agreement constitutes the contract or combination required to maintain a Section 1 unlawful tying agreement claim. In an unlawful tying arrangement, a seller wrongfully conditions the sale of the tying product on the buyer's purchase of the tied product. *See e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 9 (1984). The allegations concerning the GM-Chrysler contract do not constitute such an arrangement.[4]

C. Per-Se Unlawful Tying Arrangement

Plaintiffs allege that an agreement made by defendants restrains trade unreasonably as a matter of law. *Per se* liability under Section 1 of the Sherman Act exists when the following is proven: (1) the seller refuses to sell the tying product unless the buyer purchases the tied product; (2) the tying and tied products are separate and distinct products or services; (3) the seller possesses sufficient economic power or market power in the market for the tying product to enable it to appreciably restrain competition in the market for the tied product; and (4) a "not insubstantial" amount of interstate commerce in the

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[4] In their memorandum in opposition to defendants' motion to dismiss, plaintiffs state the following: "[t]he complaint alleges that the written contract [between GM and Chrysler] was a concerted refusal to deal, sounding more in an allocation of customers." The court will not consider whether plaintiffs have alleged some other form of antitrust violation based upon additional factual allegations contained in their opposition memorandum, but not found in plaintiffs' Complaint. As plaintiffs' Complaint alleges violation of Section 1 of the Sherman Act based on an unlawful tying arrangement, the court's discussion is limited to that claim.

tied product is affected by the tying arrangement. *See Roberts v. Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476, 1478-79 (9th Cir. 1983); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

Defendants argue that plaintiffs have failed to sufficiently allege defendants' market power over the tying product. The court agrees. Plaintiffs bear the burden of alleging facts showing appreciable market power in the market for the alleged tying product. *See e.g., Lee v. Life Ins. Co. of North America*, 23 F.3d 14, 16-18 (1st Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 427 (1994). In their opposition brief, plaintiffs allege that the "use of the logos and trademarks" is the "tying product" and that the Chrysler cars are the "tied product" p. 1, Plaintiffs' Memo. in Opp. to Mot. to Dismiss. However, plaintiffs fail to allege facts which would support their assertion that defendants have "substantial market power in the market for rent-a-car trademarks and logos." Therefore, plaintiffs have not properly alleged a *per se* unreasonable restraint of trade.

D. Actual Harm to Competition

Plaintiffs' complaint also fails to allege any injury to competition, thereby precluding plaintiffs' claims of an antitrust violation based upon the rule of reason. Plaintiffs have failed to plead any actual harm to competition. Instead, plaintiffs have alleged that the

> *intended effect* of the antitrust violations [alleged in the complaint] is to eliminate competition in the leasing of automobiles to Dollar franchisees, and thus to injure competition in the purchase,

> renting and resale of cars in the rent-a-car industry in or about the Seattle-Tacoma and Portland airports.

Para. 94, First Amended Complaint (emphasis added). As a matter of law, the lack of factual allegations of *actual harm* to competition, renders the complaint deficient under a rule of reason analysis.[5]

II. CONCLUSION

Based on the foregoing, the court GRANTS defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

DATED at Seattle, Washington this 28th day of September, 1995.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

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[5] The court also notes that there is also an issue as to whether an injury alleged to have occurred only to plaintiffs themselves would be sufficient, as a matter of law, to constitute injury to competition. *See Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 734 (9th Cir. 1987) ("Indispensable to any section 1 claim is an allegation that *competition* has been injured rather than merely competitors").

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASSAN ENTERPRISES, INC., CMC INVESTMENTS, INC., and TODD INVESTMENT COMPANY, Plaintiffs, v. CHRYSLER CORPORATION, DOLLAR SYSTEMS, INC., DOLLAR RENT-A-CAR SYSTEMS, INC., and PENTASTAR TRANSPORTATION GROUP, INC., Defendants.	NO. C94-1121R ORDER GRANTING DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT (Filed May 28, 1996)

THIS MATTER comes before the court on defendants' motion to dismiss plaintiffs' second amended complaint. Having reviewed the motion together with all documents filed in support and in opposition, and being fully advised, the court finds and rules as follows:

Twice before, plaintiffs have filed complaints in this case and twice before, the court has dismissed plaintiffs' complaints with leave to amend on grounds of failure to state a claim on which relief can be granted. Defendants now move once again to dismiss plaintiffs' second amended complaint on the same grounds. For the third time, the court finds merit in defendants' motion.

The background of these motions has already been set forth in the court's prior Orders of February 21, 1995 and September 29, 1995 granting defendants' earlier motions to dismiss plaintiffs' original and first amended complaints. In brief, the court found that plaintiffs had failed to allege a violation of Section 1 of the Sherman Act. The current complaint unfortunately suffers from the same defects as the prior two complaints:

1. Plaintiffs have failed to allege the existence of a contract, combination or conspiracy in restraint of trade. As this court has previously held, there was no agreement between plaintiffs and defendants. Indeed, plaintiffs maintain that they refused to accept defendants' alleged unlawful plan to tie the purchase of Chrysler cars to the use of the Dollar logo.

Nor was there any actionable agreement between defendants and third party General Motors Corporation ("GM"). Plaintiffs have not alleged any agreement which prohibited them from buying GM cars.

2. Plaintiffs have failed to allege a *per se* unreasonable restraint of trade in that they have not asserted any facts supporting their bald assertion that defendants have substantial market power in the market for rent-a-car trademarks and logos.

3. Plaintiffs have failed to allege any facts in support of their wholly conclusory allegation that defendants inflicted an actual harm on competition.

Defendants' motion to dismiss plaintiffs' second amended complaint is GRANTED. In view of the fact that

this is plaintiffs' third failed attempt at framing a complaint concerning their antitrust allegations, the court will not allow plaintiffs another opportunity to amend their complaint. Plaintiffs' second amended complaint is dismissed with prejudice.

DATED at Seattle, Washington this 24th day of May, 1996.

/s/ Barbara J. Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

(2)

Supreme Court, U.S.
FILED
FEB 26 1998
CLERK

No. 97-1246

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

CASSAN ENTERPRISES, INC., CMC INVESTMENTS, INC., and TODD INVESTMENT COMPANY,

Petitioners,

v.

CHRYSLER CORPORATION, DOLLAR SYSTEMS, INC., DOLLAR RENT A CAR SYSTEMS, INC., and PENTASTAR TRANSPORTATION GROUP, INC.

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Ninth Circuit properly affirmed the district court's dismissal of petitioners' Second Amended Complaint for failure to state a claim under Section 1 of the Sherman Act, where petitioners (collectively "Cassan") admittedly did not agree to or actually purchase a second product from respondents (collectively "Dollar") and, therefore, could not allege the existence of a contract, combination or conspiracy in restraint of trade.

2. Whether the United States Court of Appeals for the Ninth Circuit properly affirmed the district court's dismissal of petitioners' Second Amended Complaint on grounds that petitioners alleged standing under Section 4 of the Clayton Act, but failed to allege injury to competition as required to maintain a claim under Section 1 of the Sherman Act.

PARTIES TO THE PROCEEDINGS

Respondent Chrysler Corporation states that it has no parent company, subsidiary, or affiliate that has issued shares to the public. Effective December 23, 1997, Chrysler made an initial public offering of its rental car subsidiaries, and retained no ownership interest in that business. Respondents Dollar Systems, Inc., and Dollar Rent-A-Car Systems, Inc., have merged and are currently known as Dollar Rent A Car Systems, Inc. Dollar is a wholly-owned subsidiary of Dollar Thrifty Automotive Group, Inc., which is a publicly traded company.

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I. STATEMENT OF THE CASE

This case involves a dispute between Cassan, a rental car franchisee and Dollar, the franchisor. Cassan and Dollar entered into two franchise agreements over 20 years ago. App.6-7 ¶¶ 1, 3. Under these agreements, Cassan, as franchisee, and Dollar, as its franchisor, agreed to certain restrictions in the conduct of Cassan's franchises. One such restriction was that Dollar could approve or disapprove the use of its trademarks and logos in advertisements. *See* App. 39, ¶ 3. In 1990, Chrysler Corporation, through its subsidiary Pentastar, purchased Dollar. After the purchase, Dollar instituted a change in policy in which Chrysler automobiles would be the featured car of the Dollar fleet. Pursuant to this policy, with a few exceptions during a transitional period, franchisees were not permitted to use the Dollar logo to advertise non-Chrysler vehicles. However, franchisees were free to purchase, lease and sell non-Chrysler cars, and they could also advertise these cars so long as they did not use the Dollar logo.

After the change in trademark policy, Dollar discovered that General Motors Corporation ("GM") was negotiating with certain Dollar franchisees for the advertising of GM cars with Dollar's trademarks and logos. *See generally* App. 38-40. In settlement of this litigation with GM in March 1991, Pentastar, on behalf of Dollar and itself, entered into a Release and Settlement Agreement with GM. *Id.* Paragraph 3 of that agreement states that in recognition of pre-existing license agreement provisions and corporate policies giving Pentastar and its subsidiaries the right to stipulate their franchisees' manner of advertising, to approve or disapprove any advertising using the subsidiaries' name, trademarks or logos, and to limit franchisees from advertising non-Chrysler cars, GM "agrees not to seek an advertising agreement with persons or entities who have license or

franchise agreements with Pentastar subsidiaries," except with specified exceptions listed in the agreement. App. 39, ¶ 3. Dollar did not grant Cassan an exception to this agreement. *Id.*

Originally, Cassan sued Dollar making various state law claims and obtained a jury verdict for damages in *Cassan Enterprises, Inc. v. Dollar Systems, Inc.*, Case No. C93-1077R ("*Cassan I*"). That case was reversed by the United States Court of Appeals for the Ninth Circuit on virtually all grounds. The decision is not at issue in this Petition. While *Cassan I* was pending in the district court, the instant suit ("*Cassan II*") was filed with identical factual allegations, but asserting that the same facts violated the antitrust laws as a tying violation. The gist of Cassan's allegations was that Dollar tied the Dollar trademark to the purchase of Chrysler automobiles. However, Cassan also alleged that it chose to purchase GM cars and determined that it could do so at a lower price than Chrysler cars. App.15, ¶ 39; App. 31, ¶ 93. Accordingly, it never entered into the allegedly unlawful tying agreement.

The District Court for the Western District of Washington dismissed *Cassan II* under Fed. R. Civ. P. 12, for failure to state a claim -- three times. The Second Amended Complaint, Cassan's third and last try, was dismissed with prejudice. The Ninth Circuit affirmed the dismissal in an unpublished memorandum opinion, holding that Cassan failed to allege a contract, combination or conspiracy in restraint of trade, injury to competition to establish an antitrust violation under a rule-of-reason theory, and market power to assert a *per se* antitrust violation. Cassan petitions this Court to review only the first two issues.

There is no reason to grant the petition because the Ninth Circuit was unquestionably correct in affirming the dismissal of the Second Amended Complaint. Cassan failed to allege a contract, combination or conspiracy, a prerequisite

for a Sherman Act violation. To the contrary, it alleged that it resisted, and did not agree to, the claimed tying arrangement; therefore, no tie occurred. Indeed, even in the questions presented to this Court Cassan admits that it was "not actually forced to purchase the tied product." Contrary to Cassan's petition, there is no conflict between the lower courts on this issue: there must be some contract, combination or conspiracy in restraint of trade to establish a Sherman Act violation. Since Cassan could not allege any agreement, the Ninth Circuit properly affirmed dismissal of its claims.

Furthermore, neither the district court nor the Ninth Circuit applied an impermissible "heightened" pleading requirement to the case. Taken as a whole, Cassan's complaint alleges injury only to itself, not to competition. Since Cassan cannot allege this essential element of a Sherman Act claim, the Ninth Circuit properly affirmed the dismissal of its Second Amended Complaint.

II. REASONS FOR DENYING THE WRIT

A. The Ninth Circuit Properly Held That Cassan's Second Amended Complaint Failed To Allege A Contract, Combination Or Conspiracy In Restraint Of Trade.

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. The elements of a Section 1 violation are: (a) an agreement or conspiracy; (b) resulting in an unreasonable restraint on trade; (c) that affects competition. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 632-33 (9th Cir. 1987); *Rickards v. Canine Eye Registration Found.*, 783 F.2d 1329, 1332 (9th Cir.), *cert. denied*, 479 U.S. 851 (1986). The

Ninth Circuit correctly held that Cassan failed to allege an actionable agreement or conspiracy.

1. There Is No Conflict Between The Circuit Courts; *Ware* is Inapplicable.

Cassan asserts that the Ninth Circuit's decision conflicts with an 18-year-old decision of the United States Court of Appeals for the Sixth Circuit in *Ware v. Trailer Mart, Inc.*, 623 F.2d 1150 (6th Cir. 1980). The conflict is contrived since *Ware*, however, is inapplicable.

In *Ware*, the defendant mobile home park, required prospective tenants to purchase mobile homes as a condition of leasing space in the park. *Ware* addressed whether plaintiff had standing under § 4 of the Clayton Act to claim "injury in his business or property." The issue of standing to assert antitrust damages addressed by *Ware* is confused by petitioners with the Sherman Act § 1 requirements of an injury to competition and concert of action. Both of these requirements were bases for dismissal of Cassan's Second Amended Complaint, and neither is addressed in the *Ware* decision. The Sixth Circuit found that Ware satisfied the standing requirements by alleging that he had been economically injured by respondent's conduct. But the court did not address whether Ware had established the essential elements of a Section 1 claim. Since the contract, combination or conspiracy element was apparently not raised by the parties and certainly not addressed in the opinion, it is overreaching to cite *Ware* as holding that an agreement is not required.[1]

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[1] To the extent one could read *Ware* as holding that a Sherman Act tying violation may be maintained without an agreement or, in essence, for an attempted tie-in, the opinion is simply wrong and contrary to all decided cases addressing the issue.

2. Cassan Failed To Allege A Contract, Combination Or Conspiracy Between Cassan And Dollar.

There are several reasons why the tie or bundled sale Cassan alleges would not violate the Sherman Act, but the most important reason relied upon by the district court and the Ninth Circuit is that petitioner asserts that it did not take the tied purchase.[2] Throughout its Second Amended Complaint, Cassan alleged that it *resisted* Dollar's claimed efforts to tie the purchase of Chrysler cars to the Dollar logo and it was *not* required to purchase Chrysler automobiles. App. 15, ¶¶ 38-39; App. 9, ¶ 13 (alleging that Dollar engaged in "a deliberate attempt to destroy or cripple plaintiffs as competitors in the rent-a-car industry in Seattle and Portland *after they resisted defendants [Dollar's] unlawful tie-in agreements*") (emphasis added); App. 10, ¶ 20 ("*When plaintiffs [Cassan] resisted Chrysler's unlawful demands*, Chrysler instituted a series of retaliatory actions . . . .") (emphasis added). Indeed, in its petition, Cassan reiterates that it "[was] not actually forced to purchase the tied product." Petition at i ("Questions Presented"). In short, Cassan averred that it was never required to purchase the tied product and that it refused to accept Dollar's alleged tie-in.

Resistance to allegedly unlawful trade practices does not create a contract, combination or conspiracy under Section 1 of the Sherman Act. *Famous Brands, Inc. v. David Sherman Corp.*, 814 F.2d 517, 523-24 (8th Cir. 1987); *Shop & Save Food Markets v. Pneumo Corp.*, 683 F.2d 27, 30-31 (2d Cir.), *cert. denied*, 459 U.S. 1038 (1982); *See also Unijax, Inc. v. Champion Int'l. Inc.*, 683 F.2d 678, 685 (2d

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[2] At one point, Cassan alleged the existence of an agreement in restraint of trade between Chrysler and General Motors. Cassan appears to have abandoned this theory and does not raise it in its petition.

Cir. 1982); *Ron Tonkin Gran Turismo, Inc. v. Fiat Distribs. Inc.*, 637 F.2d 1376, 1388 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981); *Amplex of Md., Inc. v. Outboard Marine Corp.*, 380 F.2d 112, 116 (4th Cir. 1967), *cert. denied*, 389 U.S. 1036 (1968); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 915-16 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); *O.S.C. Sales Corp. v. Apple Computer, Inc.*, 601 F. Supp. 1274, 1294 (C.D. Cal. 1985), *aff'd*, 792 F.2d 1464 (9th Cir. 1986); *cf. Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984).

As the Ninth Circuit correctly held, in this case, there is simply no forced purchase. Cassan was free to purchase automobiles from Chrysler, GM or any other manufacturer it chose. Indeed, Cassan alleged that it had freely exercised that choice by purchasing GM cars. Without a coerced agreement, Cassan cannot establish a Section 1 violation and the Ninth Circuit properly affirmed dismissal of the Second Amended Complaint.

B. The Ninth Circuit Held That Cassan's Second Amended Complaint Failed To Allege Actual Harm To Competition.

Injury to competition is an essential element of a Section 1 claim under either a *per se* or rule of reason analysis. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811-12 (9th Cir. 1988). *See Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477, 489 (1977). The Ninth Circuit correctly held that Cassan failed adequately to allege an injury to competition.

1. The Ninth Circuit's Decision Does Not Conflict With *Kodak*.

Citing to this Court's decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), Cassan contends that all antitrust claims must be resolved on

a "fully developed evidentiary record" and cannot be dismissed under Fed. R. Civ. P. 12(b)(6). Petition at 15-16. *Kodak* says nothing of the sort. Nothing in that decision suggests that there is a special exception to Fed. R. Civ. P. 12(b)(6) for antitrust claims, nor has Rule 12(b)(6) been amended to exempt antitrust cases.

2. The Ninth Circuit Did Not Apply A "Heightened" Pleading Requirement.

Cassan also claims that the Ninth Circuit applied a "heightened" pleading requirement by rejecting Cassan's conclusory allegations of injury to competition. When Cassan's pleading is viewed as a whole, it is clear that all of Cassan's claims arise from a dispute that solely involves Cassan and Dollar and that Cassan is asserting only injury to itself, not to competition. Thus, as the Ninth Circuit recognized, with the exception of a general assertion of injury to competition, Cassan actually complains of injury only to itself.[3] Petitioners cannot save their complaint by baldly stating that competition is injured where there is no theory or facts asserted by which competition can be injured. *See, e.g., Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989) ("In order successfully to allege injury to competition, a section one claimant may not merely recite the bare legal conclusion that competition has been restrained unreasonably. Rather, a claimant must, at a minimum, sketch the outline of the antitrust violation with allegations of supporting factual detail").

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[3] For example, in paragraph 95, Cassan alleges that the specific intent of Dollar's alleged offenses was to injure *petitioners* and to destroy their business. App. 32 ¶ 95. Paragraphs 96 and 98 further alleges injury only to Cassan. App. 32-33, ¶ 96, 98; *See also* App. 19, ¶ 49; App., App. 20, ¶¶ 53-54; App. 27-29, ¶ 83.

The Ninth Circuit's holding is entirely consistent with this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). In that case, the Court granted certiorari to resolve a conflict among the Courts of Appeals on whether a "heightened" pleading standard applied in § 1983 actions alleging municipal liability. The Court held that the Fifth Circuit incorrectly required plaintiffs in such actions to state with "factual detail" and "particularity" the bases for their claims, including facts alleging why the defendants cannot maintain the defense of immunity. *Leatherman*, 507 U.S. at 167-68. Here, however, the Ninth Circuit announced no such "heightened" pleading requirement. Instead, it correctly ignored Cassan's conclusory statements of competitive injury where the body of the complaint belied them.

Moreover, unlike *Leatherman*, there is no conflict between lower courts on this issue. As petitioners acknowledge, Petition at 18 n. 9, numerous lower courts agree with the Ninth Circuit's application of Fed. R. Civ. P. 12(b)(6). *E.g., Crane & Shovel Sales Corp.*, 854 F.2d 802, 805 (6th Cir. 1988); *Lombard's, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974, 975 (11th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986); *Mountain View Pharmacy v. Abbott Labs.*, 630 F.2d 1383, 1387 (10th Cir. 1980); *Bethlehem Plaza v. Campbell*, 403 F. Supp. 966, 971 (E.D. Pa. 1975); *Stewart v. Hevelone*, 283 F. Supp. 842, 844 (D. Neb. 1968).

Jackson v. Marion County, 66 F.3d 151 (7th Cir. 1995), cited by petitioners, also supports the Ninth Circuit's decision in this case. While stating that the Federal Rules do not require "fact" pleading, the court acknowledged that the factual allegations the plaintiff does set forth can lead to dismissal under Fed. R. Civ. P. 12(b)(6):

> [T]here is no inconsistency between *Leatherman* and our repeated insistence . . . that a plaintiff can plead

> himself out of court by alleging facts which show that he has no claim, even though he was not required to allege those facts.
>
> * * *
>
> We have expressed our puzzlement that lawyers insist on risking dismissal by filing prolix complaints . . . But nothing in the federal rules forbids the filing of prolix complaints. If plaintiffs' lawyers want to live dangerously -- or want to find out sooner rather than later whether they have a claim -- they can.

66 F.3d at 153-54.

Cassan chose to live dangerously and file a detailed complaint that conclusively demonstrates that it has no claim. The Ninth Circuit correctly recognized that a review of all the facts pleaded showed there was no competitive injury notwithstanding a few conclusory allegations to the contrary.[4]

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[4] Moreover, Cassan's antitrust claims are barred by the doctrine of claim preclusion, or res judicata. In *Cassan I*, Cassan's factual assertions were virtually identical to those alleged in its complaint in this action. Specifically, Cassan alleged that: (a) Dollar required Cassan to purchase Chrysler automobiles; (b) Pentastar and GM entered into an agreement that precluded Cassan from advertising GM cars; (c) Dollar unfairly caused affiliated companies to compete with Cassan; and (d) Dollar failed to support Cassan's bid for a concession at the airport in Seattle-Tacoma, Washington. Plaintiffs in *Cassan I* and this action are identical. With the exception of Chrysler Corporation, the parent company of the Dollar and Pentastar defendants, the same defendants are named in both actions. Finally, *Cassan I* resulted in

III. CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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a final judgment on the merits. Although the Ninth Circuit did not reach this issue, all elements of claim preclusion are met. *See Federated Dep't. Stores, Inc. v. Moitie*, 452 U.S. 394, 398-99 (1981). For this additional reason, the Court should deny the writ.